

**FEDERAL TRADE COMMISSION**

ORGANIZATION, PROCEDURES, RULES of PRACTICE,  
and STANDARDS of CONDUCT

July 1, 1997

## TABLE OF CONTENTS

	<b>Page</b>
<b>PART 0 – ORGANIZATION</b> .....	0-1
§0.1 The Commission .....	0-1
§0.2 Official address .....	0-1
§0.3 Hours .....	0-1
§0.4 Laws administered .....	0-1
§0.5 Laws authorizing monetary claims .....	0-2
§0.6 [Reserved] .....	0-3
§0.7 Delegation of functions .....	0-3
§0.8 The Chairman .....	0-3
§0.9 Organization structure .....	0-3
§0.10 Office of the Executive Director .....	0-3
§0.11 Office of the General Counsel .....	0-4
§0.12 Office of the Secretary .....	0-5
§0.13 [Reserved] .....	0-5
§0.14 Office of Administrative Law Judges .....	0-5
§0.15 [Reserved] .....	0-5
§0.16 Bureau of Competition .....	0-5
§0.17 Bureau of Consumer Protection .....	0-6
§0.18 Bureau of Economics .....	0-6
§0.19 The Regional Offices .....	0-6
 <b>PART 1 – GENERAL PROCEDURES</b> .....	 1-1
 <b>Subpart A – Industry Guidance</b> .....	 1-1
<b>Advisory Opinions</b> .....	1-1
§1.1 Policy .....	1-1
§1.2 Procedure .....	1-1
§1.3 Advice .....	1-2
§1.4 Public disclosure .....	1-2

## TABLE OF CONTENTS

<b>Industry Guides</b> .....	1-3
§1.5 Purpose .....	1-3
§1.6 How promulgated .....	1-3
 <b>Subpart B – Rules and Rulemaking Under Section 18(a)(1)(B) of the FTC Act</b> .....	 1-4
§1.7 Scope of rules in this subpart .....	1-4
§1.8 Nature, authority and use of trade regulation rules .....	1-4
§1.9 Petitions to commence trade regulation rule proceedings .....	1-4
§1.10 Advance notice of proposed rulemaking .....	1-5
§1.11 Commencement of a rulemaking proceeding .....	1-5
§1.12 Final notice .....	1-6
§1.13 Rulemaking proceeding .....	1-7
§1.14 Promulgation .....	1-15
§1.15 Amendment or repeal of a rule .....	1-16
§1.16 Petition for exemption from trade regulation rule .....	1-16
§1.17 [Reserved] .....	1-17
§1.18 Rulemaking record .....	1-17
§1.19 Modification of a rule by the Commission at the time of judicial review .....	1-20
§1.20 Alternative procedures .....	1-20
 <b>Subpart C – Rules Promulgated Under Authority Other Than Section 18(a)(1)(B) of the FTC Act</b> .....	 1-21
§1.21 Scope of the rules in this subpart .....	1-21
§1.22 Rulemaking .....	1-21
§1.23 Quantity limit rules .....	1-21
§1.24 Rules applicable to wool, fur, and textile fiber products and rules promulgated under the Fair Packaging and Labeling Act .....	1-22

## TABLE OF CONTENTS

§1.25	Initiation of proceedings – petitions . . . . .	1-22
§1.26	Procedure . . . . .	1-22
 <b>Subpart D – Administration of the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act . . . . .</b>		
§1.31	Administration . . . . .	1-25
§1.32	Registered identification numbers . . . . .	1-25
§1.33	Continuing guaranties . . . . .	1-26
§1.34	Inspections and counseling . . . . .	1-26
 <b>Subpart E – Export Trade Associations . . . . .</b>		
§1.41	Limited antitrust exemption . . . . .	1-27
§1.42	Notice to Commission . . . . .	1-27
§1.43	Recommendations . . . . .	1-27
 <b>Subpart F – Trademark Cancellation Procedure . . . . .</b>		
§1.51	Applications . . . . .	1-28
 <b>Subpart G – Injunctive and Condemnation Proceedings . . . . .</b>		
§1.61	Injunctions . . . . .	1-29
§1.62	Ancillary court orders pending review . . . . .	1-29
§1.63	Injunctions: Wool, fur, and textile cases . . . . .	1-29
§1.64	Condemnation proceedings . . . . .	1-29
 <b>Subpart H – Administration of the Fair Credit Reporting Act . . . . .</b>		
§1.71	Administration . . . . .	1-30
§1.72	Examination, counseling and staff advice . . . . .	1-30

## TABLE OF CONTENTS

§1.73	Interpretations .....	1-30
<b>Subpart I – Procedures for Implementation of the National Environmental Policy Act of 1969 .....</b>		<b>1-33</b>
§1.81	Authority and incorporation of CEQ Regulations	1-33
§1.82	Declaration of policy. ....	1-33
§1.83	Whether to commence the process for an environmental impact statement. ....	1-34
§1.84	Draft environmental impact statements: Availability and comment .....	1-35
§1.85	Final environmental impact statements .....	1-36
§1.86	Supplemental statements .....	1-37
§1.87	NEPA and agency decisionmaking .....	1-37
§1.88	Implementing procedures .....	1-38
§1.89	Effect on prior actions .....	1-38
<b>Subpart J – Economic Surveys, Investigations, and Reports .....</b>		<b>1-39</b>
§1.91	Authority and purpose .....	1-39
<b>Subpart K – Penalties for Violation of Appliance Labeling Rules .....</b>		<b>1-40</b>
§1.92	Scope .....	1-40
§1.93	Notice of proposed penalty .....	1-40
§1.94	Commission proceeding to assess civil penalty ..	1-41
§1.95	Procedures upon election .....	1-41
§1.96	Compromise of penalty .....	1-41
§1.97	Amount of penalty .....	1-41
<b>Subpart L – Civil Penalty Adjustments Under the Debt Collection Improvement Act of 1996 .....</b>		<b>1-43</b>

## TABLE OF CONTENTS

§1.98	Adjustment of civil monetary penalty amounts . . .	1-43
<b>PART 2 – NONADJUDICATIVE PROCEDURES . . . . .</b>		<b>2-1</b>
<b>Subpart A – Inquiries; Investigations; Compulsory Processes . . . . .</b>		<b>2-1</b>
§2.1	How initiated . . . . .	2-1
§2.2	Request for Commission action . . . . .	2-1
§2.3	Policy as to private controversies . . . . .	2-2
§2.4	Investigational policy . . . . .	2-2
§2.5	By whom conducted . . . . .	2-2
§2.6	Notification of purpose . . . . .	2-2
§2.7	Compulsory process in investigations . . . . .	2-3
§2.8	Investigational hearings . . . . .	2-6
§2.8A	Withholding requested material . . . . .	2-7
§2.9	Rights of witnesses in investigations . . . . .	2-7
§2.10	Depositions . . . . .	2-9
§2.11	Orders requiring access . . . . .	2-10
§2.12	Reports . . . . .	2-11
§2.13	Noncompliance with compulsory processes . . . . .	2-12
§2.14	Disposition . . . . .	2-13
§2.15	Orders requiring witnesses to testify or provide other information and granting immunity . . . . .	2-13
§2.16	Custodians . . . . .	2-14
<b>Subpart B – [Reserved] . . . . .</b>		<b>2-15</b>
<b>Subpart C – Consent Order Procedure . . . . .</b>		<b>2-16</b>
§2.31	Opportunity to submit a proposed consent order .	2-16
§2.32	Agreement . . . . .	2-16
§2.33	Compliance procedure . . . . .	2-17
§2.34	Disposition . . . . .	2-17

## TABLE OF CONTENTS

### **Subpart D – Reports of Compliance . . . . . 2-19**

#### **§2.41 Reports of compliance . . . . . 2-19**

### **Subpart E – Requests to Reopen . . . . . 2-24**

#### **§2.51 Requests to reopen . . . . . 2-24**

## **PART 3 – RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS . . . . . 3-1**

### **Subpart A – Scope of Rules; Nature of Adjudicative Proceedings . . . . . 3-1**

#### **§3.1 Scope of the rules in this part . . . . . 3-1**

#### **§3.2 Nature of adjudicative proceedings . . . . . 3-1**

### **Subpart B – Pleadings . . . . . 3-2**

#### **§3.11 Commencement of proceedings . . . . . 3-2**

#### **§3.11A Fast track proceedings . . . . . 3-2**

#### **§3.12 Answer . . . . . 3-5**

#### **§3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act . . . . . 3-6**

#### **§3.14 Intervention . . . . . 3-7**

#### **§3.15 Amendments and supplemental pleadings . . . . . 3-8**

### **Subpart C – Prehearing Procedures; Motions; Interlocutory Appeals; Summary Decisions . . . . . 3-9**

#### **§3.21 Prehearing procedures . . . . . 3-9**

## TABLE OF CONTENTS

§3.22	Motions .....	3-10
§3.23	Interlocutory appeals .....	3-13
§3.24	Summary decisions .....	3-14
§3.25	Consent agreement settlements .....	3-17
§3.26	Motions following denial of preliminary injunctive relief .....	3-19
<b>Subpart D – Discovery; Compulsory Process .....</b>		<b>3-21</b>
§3.31	General provisions .....	3-21
§3.32	Admissions .....	3-25
§3.33	Depositions .....	3-26
§3.34	Subpoenas .....	3-31
§3.35	Interrogatories to parties .....	3-32
§3.36	Applications for subpoenas for records, or appearances by officials or employees, of governmental agencies other than the Commission .....	3-33
§3.37	Production of documents and things; access for inspection and other purposes .....	3-34
§3.38	Motion for order compelling disclosure or discovery; sanctions .....	3-35
§3.38A	Withholding requested material .....	3-37
§3.39	Orders requiring witnesses to testify or provide other information and granting immunity .....	3-37
§3.40	Admissibility of evidence in advertising substantiation cases .....	3-38
<b>Subpart E – Hearings .....</b>		<b>3-40</b>
§3.41	General rules .....	3-40
§3.42	Presiding officials .....	3-41
§3.43	Evidence .....	3-44
§3.44	Record .....	3-45



## TABLE OF CONTENTS

§3.45	<i>In camera</i> orders . . . . .	3-46
§3.46	Proposed findings, conclusions, and order . . . . .	3-48
<b>Subpart F – Decision . . . . .</b>		<b>3-50</b>
§3.51	Initial decision . . . . .	3-50
§3.52	Appeal from initial decision . . . . .	3-52
§3.53	Review of initial decision in absence of appeal . . .	3-56
§3.54	Decision on appeal or review . . . . .	3-56
§3.55	Reconsideration . . . . .	3-57
§3.56	Effective date of orders; application for stay . . . .	3-58
<b>Subpart G – [Reserved] . . . . .</b>		<b>3-58</b>
<b>Subpart H – Reopening of Proceedings . . . . .</b>		<b>3-59</b>
§3.71	Authority . . . . .	3-59
§3.72	Reopening . . . . .	3-59
<b>Subpart I– Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings . . . . .</b>		<b>3-62</b>
§3.81	General provisions . . . . .	3-62
§3.82	Information required from applicants . . . . .	3-65
§3.83	Procedures for considering applicants . . . . .	3-68
<b>PART 4 – MISCELLANEOUS RULES . . . . .</b>		<b>4-1</b>
§4.1	Appearances . . . . .	4-1
§4.2	Requirements as to form, and filing of documents other than correspondence . . . . .	4-7
§4.3	Time . . . . .	4-9
§4.4	Service . . . . .	4-10

## TABLE OF CONTENTS

§4.5	Fees . . . . .	4-13
§4.6	Cooperation with other agencies . . . . .	4-13
§4.7	<i>Ex parte</i> communications . . . . .	4-13
§4.8	Costs for obtaining Commission records . . . . .	4-16
§4.9	The public record . . . . .	4-22
§4.10	Nonpublic material . . . . .	4-29
§4.11	Disclosure requests . . . . .	4-34
§4.12	Disposition of documents submitted to the Commission . . . . .	4-41
§4.13	Privacy Act rules . . . . .	4-42
§4.14	Conduct of business . . . . .	4-49
§4.15	Commission meetings . . . . .	4-50
§4.16	Privilege against self-incrimination . . . . .	4-53
§4.17	Disqualification of Commissioners . . . . .	4-54

## **PART 5 – STANDARDS OF CONDUCT . . . . . 5-1**

### **Subpart A – Employee Conduct Standards and Financial Conflicts of Interest . . . . . 5-1**

§5.1	Cross-reference to executive branch-wide regulations . . . . .	5-1
§5.2	Exemption of insubstantial financial conflicts . . . . .	5-1

### **Subpart B – Financial Disclosure Requirements . . . . . 5-3**

§5.10	Cross-reference to executive branch-wide regulations . . . . .	5-3
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### **Subpart C – [Reserved] . . . . . 5-3**

### **Subpart D – [Reserved] . . . . . 5-3**

## TABLE OF CONTENTS

<b>Subpart E – Disciplinary Actions Concerning Postemployment Conflict of Interest</b>	<b>5-4</b>
§5.51 Scope and applicability	5-4
§5.52 Nonpublic proceedings	5-4
§5.53 Initiation of investigation	5-4
§5.54 Referral to the Office of Government Ethics and to the Department of Justice	5-4
§5.55 Conduct of investigation	5-5
§5.56 Disposition	5-5
§5.57 Order to show cause	5-5
§5.58 Answer and request for a hearing	5-6
§5.59 Presiding official	5-7
§5.60 Scheduling of hearing	5-7
§5.61 Prehearing procedures; motions; interlocutory appeals; summary decision; discovery; compulsory process	5-7
§5.62 Hearing rights of respondent	5-8
§5.63 Evidence; transcript; <i>in camera</i> orders; proposed findings of fact and conclusions of law	5-8
§5.64 Initial decision	5-8
§5.65 Review of initial decision	5-8
§5.66 Commission decision and reconsideration	5-9
§5.67 Sanctions	5-9
§5.68 Judicial review	5-9
<b>INDEX</b>	<b>I-1</b>

## **PART 0 – ORGANIZATION**

**§0.1 The Commission.** The Federal Trade Commission is an independent administrative agency which was organized in 1915 pursuant to the Federal Trade Commission Act of 1914 (38 Stat. 717, as amended; 15 U.S.C. 41 - 58). It is responsible for the administration of a variety of statutes which, in general, are designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services. It is composed of five members appointed by the President and confirmed by the Senate for terms of seven years.

**§0.2 Official address.** The principal office of the Commission is at Washington, DC. All communications to the Commission should be addressed to the Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, DC 20580, unless otherwise specifically directed.

**§0.3 Hours.** Principal and field offices are open on each business day from 8:30 a.m. to 5 p.m.

**§0.4 Laws administered.** The Commission exercises enforcement and administrative authority under

the Federal Trade Commission Act (38 Stat. 717, as amended (15 U.S.C. 41 - 58)),

the Clayton Act (38 Stat 730, as amended (15 U.S.C. 12 - 27)),

the Export Trade Act (40 Stat. 516, as amended (15 U.S.C. 61 - 65)),

the Packers and Stockyards Act (42 Stat. 159, as amended (7 U.S.C. 181 - 229)),

the Wool Products Labeling Act (54 Stat. 1128, as amended (15 U.S.C. 68 - 68j)),

the Trade-Mark Act (60 Stat. 427, as amended (15 U.S.C. 1051 - 72)),

the Fur Products Labeling Act (65 Stat. 175, as amended (15 U.S.C. 69 - 69j)),

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

the Textile Fiber Products Identification Act (72 Stat. 1717, as amended (15 U.S.C. 70 - 70k)),  
the Federal Cigarette Labeling and Advertising Act (79 Stat. 282, as amended (15 U.S.C. 1331 - 39)),  
the Fair Packaging and Labeling Act (80 Stat. 1296, as amended (15 U.S.C. 1451 - 61)),  
the Truth in Lending Act (82 Stat. 146, as amended (15 U.S.C. 1601 *et seq.*)),  
the Fair Credit Reporting Act (84 Stat. 1128 (15 U.S.C. 1681 *et seq.*)),  
the Fair Credit Billing Act (88 Stat. 1511 (15 U.S.C. 1666)),  
the Equal Credit Opportunity Act (88 Stat. 1521, as amended (15 U.S.C. 1691)),  
the Hobby Protection Act (87 Stat. 686 (15 U.S.C. 2101)),  
the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (88 Stat. 2183 (15 U.S.C. 2301 - 12, 45 - 58)),  
the Energy Policy and Conservation Act (89 Stat. 871 (42 U.S.C. 6291)),  
the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (90 Stat. 1383 (15 U.S.C. 1311)),  
and other Federal statutes.

**§0.5 Laws authorizing monetary claims.** The Commission is authorized to entertain monetary claims against it under two statutes. The Federal Tort Claims Act (28 U.S.C. 2671 - 2680) provides that the United States shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions of its employees acting within the scope of their employment or office. The Military Personnel and Civilian Employees Claims Act of 1964 (31 U.S.C. 3701, 3721) authorizes the Commission to compensate employees' claims for damage to or loss of personal property incident to their service. The Commission's claims officer for both statutes is Teresa A. Hennessy, telephone (202) 523-3533.

## **§0.6 [Reserved]**

## PART 0 – ORGANIZATION

**§0.7 Delegation of functions.** The Commission, under the authority provided by Reorganization Plan No. 4 of 1961, may delegate, by published order or rule, certain of its functions to a division of the Commission, an individual Commissioner, an administrative law judge, or an employee or employee board.

**§0.8 The Chairman.** The Chairman of the Commission is designated by the President, and, subject to the general policies of the Commission, is the executive and administrative head of the agency. He presides at meetings of and hearings before the Commission and participates with other Commissioners in all Commission decisions. Attached to the Office of the Chairman, and reporting directly to him, and through him to the Commission, are the following staff units:

(a) The Office of Public Affairs, which furnishes information concerning Commission activities to news media and the public; and

(b) the Office of Congressional Relations, which coordinates all liaison activities with Congress.

**§0.9 Organization structure.** The Federal Trade Commission comprises the following principal units:

Office of the Executive Director,  
Office of the General Counsel,  
Office of the Secretary,  
Office of Administrative Law Judges,  
Bureau of Competition,  
Bureau of Consumer Protection,  
Bureau of Economics,  
The Regional Offices.

### **§0.10 Office of the Executive Director.**

(a) The Executive Director, under the direction of the Chairman, is the chief operating official. He exercises executive and administrative supervision over all the offices, bureaus, and staff of the Commission and resolves problems concerning priorities in case

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

handling. Immediately under his direction are the Deputy Executive Directors for Management and Planning and Information.

(b) The Deputy Executive Director for Management functions as staff advisor to the Executive Director in all aspects of administrative management; provides administrative policy guidance to agency management and provides general supervision to the programs of procurement and contracts, personnel, budget and finance, and administrative service activities; and initiates and develops long-range plans to assure that the Commission acquires and effectively utilizes the manpower, financial resources, physical facilities and management tools necessary to accomplish its mission.

(c) The Deputy Executive Director for Planning and Information provides general supervision to the programs of data processing and information systems, information analysis, and the library; responds to initial requests for Commission records under the Freedom of Information and Privacy Acts; maintains a current index of opinions, orders, statements of policy and interpretations, staff manuals and instructions that affect any member of the public, and other public records of the Commission; makes available for inspection and copying all public records of the Commission; coordinates the Commission's information processing systems; and is responsible for the publication of all Commission actions which must appear in the *Federal Register* and for the publication of *Federal Trade Commission Decisions* and *Court Decisions – Federal Trade Commission*.

**§0.11 Office of the General Counsel.** The General Counsel is the Commission's chief law officer and adviser, who renders necessary legal services to the Commission, represents the Commission in the Federal and State Courts, advises the Commission with respect to questions of law and policy, including advice with respect to legislative matters, cooperates with and assists State and local officials in the efforts to eliminate local and national trade restraints.

**§0.12 Office of the Secretary.** The Secretary is responsible for the minutes of Commission meetings and is the legal custodian of the

## PART 0 – ORGANIZATION

Commission's seal, property, papers, and records, including legal and public records. The Secretary, or in his absence an Acting Secretary designated by the Commission, signs Commission orders and official correspondence.

### **§0.13 [Reserved]**

**§0.14 Office of Administrative Law Judges.** Administrative law judges are officials to whom the Commission, in accordance with law, delegates the initial performance of its adjudicative fact-finding functions to be exercised in conformity with Commission decisions and policy directives and with its rules of practice. The administrative law judges also serve as presiding officers assigned to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act as amended and other rulemaking proceedings as directed. The Chief Administrative Law Judge also serves as the Chief Presiding Officer. Administrative law judges are appointed under the authority and subject to the prior approval of the Office of Personnel Management.

### **§0.15 [Reserved]**

**§0.16 Bureau of Competition.** The bureau is responsible for enforcing Federal antitrust and trade regulation laws under section 5 of the Federal Trade Commission Act, the Clayton Act, and a number of other special statutes which the Commission is charged with enforcing. The bureau work aims to preserve the free market system and assure the unfettered operation of the forces of supply and demand. Its activities seek to ensure price competition, quality products and services and efficient operation of the national economy. The bureau carries out its responsibilities by investigating alleged law violations, and recommending to the Commission such further action as may be appropriate. Such action may include injunctive relief in Federal District Court, complaint and litigation before the agency's administrative law judges, formal nonadjudicative settlement of



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

complaints, trade regulation rules, or reports. The bureau also conducts compliance investigations and initiates proceedings for civil penalties to assure compliance with final Commission orders dealing with competition and trade restraint matters.

**§0.17 Bureau of Consumer Protection.** The bureau investigates unfair or deceptive acts or practices under section 5 of the Federal Trade Commission Act as well as potential violations of numerous special statutes which the Commission is charged with enforcing. It prosecutes before the agency's administrative law judges alleged violations of law after issuance of a complaint by the Commission or obtains through negotiation consented-to orders, which must be accepted and issued by the Commission. The bureau participates in trade regulation rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act and other rulemaking proceedings under other statutory authority. It investigates compliance with final orders and trade regulation rules and seeks civil penalties or consumer redress for their violation. In addition, the bureau seeks to educate both consumers and the business community about the laws it enforces.

**§0.18 Bureau of Economics.** The bureau aids and advises the Commission concerning the economic aspects of all of its functions, and is responsible for the preparation of various economic reports and surveys. The bureau provides economic and statistical assistance to the enforcement bureaus in the investigation and trial of cases.

### **§0.19 The Regional Offices.**

(a) These offices are investigatory arms of the Commission, and with respect to matters of a regional nature, have responsibility for investigational, trial, compliance, and consumer educational activities as delegated by the Commission. Each regional office has general responsibility for its own activities and for the smaller offices, designated as field stations, located in its area of responsibility. They

## PART 0 – ORGANIZATION

are under the general supervision of the Office of the Executive Director, and clear their activities through the appropriate operating bureaus.

(b) The addresses of the respective regional offices, and of the field stations located in the area of each are as follows:

(1) *Atlanta Regional Office*. Federal Trade Commission, Suite 5M35, Midrise Building, 60 Forsyth Street, S.W., Atlanta, GA 30303.

(2) *Boston Regional Office*. Federal Trade Commission, Suite 810, 101 Merrimac Street, Boston, MA 02114-4719.

(3) *Chicago Regional Office*. Federal Trade Commission, Suite 1860, 55 East Monroe Street, Chicago, IL 60603-5701.

(4) *Cleveland Regional Office*. Federal Trade Commission, Suite 200, 1111 Superior Avenue, Cleveland, OH 44114.

(5) *Dallas Regional Office*. Federal Trade Commission, Suite 2150, 1999 Bryan Street, Dallas, TX 75201.

(6) *Denver Regional Office*. Federal Trade Commission, Suite 1523, 1961 Stout Street, Denver, CO 80294-0101.

(7) *Los Angeles Regional Office*. Federal Trade Commission, Suite 13209, 11000 Wilshire Boulevard, Los Angeles, CA 90024.

(8) *New York Regional Office*. Federal Trade Commission, 13th Floor, 150 William Street, New York, NY 10038.

(9) *San Francisco Regional Office*. Federal Trade Commission, Suite 570, 901 Market Street, San Francisco, CA 94103.

(10) *Seattle Regional Office*. Federal Trade Commission, Suite 2896, 915 Second Avenue, Seattle, WA 98174.

(c) Each of the regional offices is supervised by a Regional Director, who is available for conferences with attorneys, consumers, and other members of the public on matters relating to the Commission's activities.

## **PART 1 – GENERAL PROCEDURES**

### **Subpart A – Industry Guidance**

#### **Advisory Opinions**

##### **§1.1 Policy.**

(a) Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. The Commission will consider such requests for advice and inform the requesting party of the Commission's views, where practicable, under the following circumstances.

(1) The matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; or

(2) The subject matter of the request and consequent publication of Commission advice is of significant public interest.

(b) The Commission has authorized its staff to consider all requests for advice and to render advice, where practicable, in those circumstances in which a Commission opinion would not be warranted. Hypothetical questions will not be answered, and a request for advice will ordinarily be considered inappropriate where:

(1) The same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding involving the Commission or another governmental agency, or

(2) An informed opinion cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

##### **§1.2 Procedure.**

(a) *Application.* The request for advice or interpretation should be submitted in writing (one original and two copies) to the Secretary of the Commission and should: (1) State clearly the question(s) that the applicant wishes resolved; (2) cite the provision of law under which the question arises; and (3) state all facts which the applicant believes

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

to be material. In addition, the identity of the companies and other persons involved should be disclosed. Letters relating to unnamed companies or persons may not be answered. Submittal of additional facts may be requested prior to the rendering of any advice.

(b) *Compliance matters.* If the request is for advice as to whether the proposed course of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in §2.41 of this chapter.

### **§1.3 Advice.**

(a) On the basis of the materials submitted, as well as any other information available, and if practicable, the Commission or its staff will inform the requesting party of its views.

(b) Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

(c) Advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding.

**§1.4 Public disclosure.** Written advice rendered pursuant to this section and requests therefor, including names and details, will be placed in the Commission's public record immediately after the requesting party has received the advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's

## PART 1 – GENERAL PROCEDURES

rules, and the public interest. A request for confidential treatment of information submitted in connection with the questions should be made separately.

### **Industry Guides**

**§1.5 Purpose.** Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

**§1.6 How promulgated.** Industry guides\* are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group, when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission. In connection with the promulgation of industry guides, the Commission at any time may conduct such investigations, make such studies, and hold such conferences or hearings as it may deem appropriate. All or any part of any such investigation, study, conference, or hearing may be conducted under the provisions of subpart A of part 2 of this chapter.

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\*In the past, certain of these have been promulgated and referred to as trade practice rules.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart B – Rules and Rulemaking  
Under Section 18(a)(1)(B) of the FTC Act**

**§1.7 Scope of rules in this subpart.** The rules in this subpart apply to and govern proceedings for the promulgation of rules as provided in section 18(a)(1)(B) of the Federal Trade Commission Act. Such rules shall be known as trade regulation rules. All other rulemaking proceedings shall be governed by the rules in subpart C, except as otherwise required by law or as otherwise specified in this chapter.

**§1.8 Nature, authority and use of trade regulation rules.**

(a) For the purpose of carrying out the provisions of the Federal Trade Commission Act, the Commission is empowered to promulgate trade regulation rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce. Such rules may include requirements prescribed for the purpose of preventing such acts or practices. A violation of a rule shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of that Act, unless the Commission otherwise expressly provides in its rule. However, the respondent in an adjudicative proceeding may show that his conduct does not violate the rule or assert any other defense to which he is legally entitled.

(b) The Commission at any time may conduct such investigations, make such studies and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of subpart A of part 2 of this chapter.

**§1.9 Petitions to commence trade regulation rule proceedings.**

Trade regulation rule proceedings may be commenced by the Commission upon its own initiative or pursuant to written petition filed with the Secretary by any interested person stating reasonable grounds therefor. If the Commission determines to commence a trade regulation rule proceeding pursuant to the petition, the petitioner shall

## PART 1 – GENERAL PROCEDURES

be mailed a copy of the public notices issued under §§1.10, 1.11 and 1.12. Any person whose petition is not deemed by the Commission sufficient to warrant commencement of a rulemaking proceeding shall be notified of that determination and may be given an opportunity to submit additional data.

### **§1.10 Advance notice of proposed rulemaking.**

(a) Prior to the commencement of any trade regulation rule proceeding, the Commission shall publish in the *Federal Register* an advance notice of such proposed proceeding.

(b) The advance notice shall:

(1) Contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(2) Invite the response of interested persons with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(c) The advance notice shall be submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate and Foreign Commerce of the House of Representatives.

(d) The Commission may, in addition to publication of the advance notice, use such additional mechanisms as it considers useful to obtain suggestions regarding the content of the area of inquiry before publication of an initial notice of proposed rulemaking pursuant to §1.11.

### **§1.11 Commencement of a rulemaking proceeding.**

(a) *Initial notice.* A trade regulation rule proceeding shall commence with an initial notice of proposed rulemaking. Such notice shall be published in the *Federal Register* not sooner than 30 days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Interstate

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

and Foreign Commerce of the House of Representatives. The initial notice shall include:

(1) The text of the proposed rule including any alternatives which the Commission proposes to promulgate;

(2) Reference to the legal authority under which the rule is proposed;

(3) A statement describing with particularity the reason for the proposed rule;

(4) An invitation to all interested persons to propose issues which meet the criteria of §1.13(d)(1)(i) for consideration in accordance with §1.13(d)(5) and (d)(6);

(5) An invitation to all interested persons to comment on the proposed rule; and

(6) A statement of the manner in which the public may obtain copies of the preliminary regulatory analysis.

(b) *Preliminary regulatory analysis.* Except as otherwise provided by statute, the Commission shall, when commencing a rulemaking proceeding, issue a preliminary regulatory analysis which shall contain:

(1) A concise statement of the need for, and the objectives of, the proposed rule;

(2) A description of any reasonable alternatives to the proposed rule which may accomplish the stated objective of the rule in a manner consistent with applicable law;

(3) For the proposed rule, and for each of the alternatives described in the analysis, a preliminary analysis of the projected benefits and any adverse economic effects and any other effects, and of the effectiveness of the proposed rule and each alternative in meeting the stated objectives of the proposed rule; and

(4) The information required by the Regulatory Flexibility Act at 5 U.S.C. 603.

**§1.12 Final notice.** A final notice of proposed rulemaking shall be published in the *Federal Register* and, to the extent practicable,



## PART 1 – GENERAL PROCEDURES

otherwise made available to interested persons. The final notice shall include:

- (a) Designated issues, unless there are none, which are to be considered in accordance with §1.13(d)(5) and (d)(6);
- (b) The time and place of an informal hearing;
- (c) Instructions to interested persons seeking to make oral presentations;
- (d) A requirement that interested persons who desire to avail themselves of the procedures of §1.13(d)(5) and (d)(6) with respect to any issue designated in paragraph (a) of this section must identify their interests with respect to those issues in such manner as may be established by the presiding officer; and
- (e) An incorporation by reference of the contents of the initial notice.

### **§1.13 Rulemaking proceeding.**

(a) *Written comments.* After commencement of a trade regulation rule proceeding, the Commission shall accept written submissions of data, views, and arguments on all issues of fact, law, and policy. The initial notice shall specify the deadline for filing written comments under this subsection.

(b) *Comments proposing issues subject to the procedures of §1.13(d)(5) and (d)(6).* Interested persons may propose issues for consideration in accordance with §1.13(d)(5) and (d)(6) until thirty (30) days after the close of the written comment period or such other period as the Commission may establish in the initial notice.

(c) *Presiding officer.*

(1) *Assignment.* Upon commencement of a proposed trade regulation rule proceeding, a presiding officer shall be appointed by the Chief Presiding Officer or, when the Commission or one or more of its members serves as presiding officer, by the Commission.

(2) *Powers of the presiding officer.* The presiding officer shall be responsible for the orderly conduct of the rulemaking proceeding and the maintenance of the rulemaking and public records until the close

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

of the postrecord comment period. He shall have all powers necessary to that end including the following:

(i) To publish a final notice in accordance with §1.12 or issue any other public notice that may be necessary for the orderly conduct of the rulemaking proceeding;

(ii) To designate or modify, issues for consideration in accordance with §1.13(d)(5) and (d)(6);

(iii) To set the time and place of the informal hearing and to change any time periods prescribed in this subpart;

(iv) To prescribe rules or issue rulings to avoid unnecessary costs or delay. Such rules or rulings may include, but are not limited to, the imposition of reasonable time limits on each person's oral presentation; and requirements that any examination; including cross-examination, which a person may be entitled to conduct or have conducted be conducted by the presiding officer on behalf of that person in such a manner as the presiding officer determines to be appropriate and to be required for a full and true disclosure with respect to any issue designated for consideration in accordance with §1.13 (d)(5) and (d)(6);

(v) To make rules and rulings limiting the representation of interested persons for the purpose of examination, including cross-examination, and governing the manner in which such examination is limited, including the selection of a representative from among a group of persons with the same or similar interests;

(vi) To require that oral presentations at the informal hearing or responses to written questions be under oath;

(vii) To require that oral presentations at the informal hearing be submitted in writing in advance of presentation;

(viii) To certify questions to the Commission for its determination; and

(ix) To rule upon all motions or petitions of interested persons, which motions or petitions must be filed with the presiding officer until the close of the postrecord comment period.

## PART 1 – GENERAL PROCEDURES

### *(3) Review of rulings by the presiding officer.*

*(i) Review after certification by the presiding officer.* Except as otherwise provided in paragraph (c)(3)(ii) of this section, applications for review of a ruling will not be entertained by the Commission prior to its review of the record pursuant to §1.14, unless the presiding officer certifies in writing to the Commission that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate review of the ruling may materially advance the ultimate termination of the proceeding or subsequent review will be an inadequate remedy. Within five (5) days after a ruling by the presiding officer, any interested person may petition the presiding officer for certification of that ruling to the Commission. Certification of a ruling shall not stay the rulemaking proceeding unless the presiding officer or the Commission shall so order. Submissions to the Commission not to exceed fifteen (15) pages may be made within ten (10) days of the presiding officer's certification. All such filings shall be a part of the rulemaking record. The Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the application for review and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission.

*(ii) Review without certification by the presiding officer.* Within ten (10) days after publication of the final notice, any interested person may petition the Commission for addition, modification or deletion of a designated issue, accompanied by a filing not to exceed fifteen (15) pages. Additional submissions on the issue by other interested persons, not to exceed fifteen (15) pages, may be made within twenty (20) days of the publication of the final notice. The Commission may thereupon, in its discretion, permit the appeal. Commission review, if permitted, will be based on the petition and any additional submissions, without oral argument or further briefs, unless otherwise ordered by the Commission. A petition hereunder shall not stay the rulemaking proceeding unless the presiding officer or the

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

Commission shall so order. All petitions filed under this paragraph shall be a part of the rulemaking record. Notice of the filing of any such petition may be obtained from the Office of the Secretary of the Commission. In the event any designated issue is added or substantially modified by the Commission, interested persons shall be given a further opportunity to identify their interests with respect to those issues.

(4) *Substitution of presiding officer.* In the event of the substitution of a new presiding officer for the one originally appointed, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(5) *Organization.* In the performance of their rulemaking functions, presiding officers shall be responsible to the chief presiding officer who shall not be responsible to any other officer or employee of the Commission.

(6) *Ex parte communications.* Except as required for the disposition of *ex parte* matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(d) *Informal hearings.* An informal hearing with the opportunity for oral presentations on all issues shall be conducted by the presiding officer. In addition, if an issue is designated pursuant to these rules for consideration in accordance with §1.13(d) (5) and (6), the informal hearing on such issues shall be conducted in accordance with those paragraphs. For all other issues the presiding officer may in his discretion employ, in whole or in part, the procedures of those paragraphs.

(1) *Nature of issues for consideration in accordance with §1.13 (d)(5) and (d)(6).*

(i) *Issues that must be considered in accordance with §1.13(d)(5) and (d)(6).* The only issues that must be designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section are

## PART 1 – GENERAL PROCEDURES

disputed issues of fact that are determined by the Commission or the presiding officer to be material and necessary to resolve.

(ii) *Issues that may be considered in accordance with §1.13(d)(5) and (d)(6).* The Commission and the presiding officer retain the power to designate any other issues for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section.

(2) *Addition or modification of issues for consideration in accordance with §1.13(d)(5) and (d)(6).* The presiding officer may at any time on his own motion or pursuant to a written petition by interested persons, add or modify any issues designated pursuant to §1.12(a). No such petition shall be considered unless good cause is shown why any such proposed issue was not proposed pursuant to §1.13(b).

(3) *Identification of interests.* Not later than twenty (20) days after publication of the final notice each interested person who desires to avail himself of the procedures of paragraphs (d)(5) and (d)(6) of this section shall notify the presiding officer in writing of his particular interest with respect to each issue designated for consideration in accordance with those subsections. In the event that new issues are designated, each interested person shall promptly notify the presiding officer of his particular interest with respect to each such issue.

(4) *Examination and cross-examination by the presiding officer.* The presiding officer may conduct any examination, including cross-examination, to which a person may be entitled. For that purpose he may require submission of written requests for presentation of questions to any person making oral presentations and shall determine whether to ask such questions or any other questions. All requests for presentation of questions shall be placed in the rulemaking record.

(5) *Examination, cross-examination, and the presentation of rebuttal submissions by interested persons.*

(i) *In general.* The presiding officer shall conduct or allow to be conducted examination, including cross-examination of oral presentations and the presentation of rebuttal submissions relevant to the issues designated for consideration in accordance with paragraphs

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(d)(5) and (d)(6) of this section. Examination, including, cross-examination, and the presentation of rebuttal submissions, shall be allowed to the extent to which it is appropriate and is required for a full and true disclosure with respect to those issues. Requests for an opportunity to examine, including cross-examine, or to present rebuttal submissions, shall be accompanied by a specific justification therefor. In determining whether or not to grant such requests, the presence of the following circumstances indicate that such requests should be granted:

(A) An issue for examination including cross-examination, or the presentation of rebuttal submissions, is an issue of specific in contrast to legislative fact.

(B) A full and true disclosure with respect to the issue can only be achieved through examination including cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions.

(C) Circumstantial guarantees of the trustworthiness of a presentation do not exist.

(D) The particular presentation is required for the resolution of a designated issue.

(ii) *Selection of representatives for cross-examination.* After consideration of the information supplied in response to the final notice, the presiding officer shall identify groups of persons with the same or similar interests in the proceeding. Any such group may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the presiding officer may select a representative of each such group.

(iii) *Inability to select representative for examination, including cross-examination.* No person shall be denied the opportunity to conduct or have conducted, examination, including cross-examination, under paragraph (d)(5)(i) of this section if he is a member of a group as described in paragraph (d)(5)(ii) of this section and is unable to agree upon group representation with other group members after a

## PART 1 – GENERAL PROCEDURES

good faith effort to do so and seeks to present substantial and relevant issues which will not be adequately presented by the group representative. In that event he shall be allowed to conduct or have conducted any examination, including cross-examination, to which he is entitled on issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section and which affect his particular interest.

(6) *Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions.* During the course of the rulemaking proceeding, the presiding officer shall entertain requests from the Commission's staff or any interested person to compel the attendance of persons or the production of documents or to obtain responses to written questions. Requests to compel the attendance of persons or the production of documents or to obtain responses to written questions shall contain a statement showing the general relevancy of the material, information or presentation, and the reasonableness of the scope of the request, together with a showing that such material, information or presentation is not available by voluntary methods and cannot be obtained through examination, including cross-examination, of oral presentations or the presentation of rebuttal submissions, and is appropriate and required for a full and true disclosure with respect to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section. If the presiding officer determines that a request should be granted, he shall transmit his determination to the Commission which shall determine whether to issue a civil investigative demand under §2.7(b). Information received in response to such a demand may be disclosed in the rulemaking proceeding subject to an *in camera* order under §1.18(b).

(e) *Written transcript.* A verbatim transcript shall be made of the informal hearing which transcript shall be placed in the rulemaking record.

(f) *Staff recommendations.* The staff shall make recommendations to the Commission in a report on the rulemaking record. Such report

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

shall contain its analysis of the record and its recommendations as to the form of the final rule.

(g) *Recommended decision.* After publication of the staff report, the presiding officer shall make a recommended decision based upon his or her findings and conclusions as to all relevant and material evidence, and taking into account the staff report. The recommended decision shall be made by the presiding officer who presided over the rulemaking proceeding except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(h) *Postrecord comment.* The staff report and the presiding officer's recommended decision shall be the subject of public comment for a period to be prescribed by the presiding officer at the time the recommended decision is placed in the rulemaking record. The comment period shall be no less than sixty (60) days. The comments shall be confined to information already in the record and may include requests for review by the Commission of determinations made by the presiding officer.

(i) *Commission review of the rulemaking record.* The Commission shall review the rulemaking record to determine what form of rule, if any, it should promulgate. During this review process, the Commission may allow persons who have previously participated in the proceeding to make oral presentations to the Commission, unless it determines with respect to that proceeding that such presentations would not significantly assist it in its deliberations. Presentations shall be confined to information already in the rulemaking record. Requests to participate in an oral presentation must be received by the Commission no later than the close of the comment period under §1.13(h). The identity of the participants and the format of such presentations will be announced in advance by the Office of Public Information in the Commission's *Weekly Calendar and Notice of "Sunshine" Meetings* and in accordance with the applicable provisions of 5 U.S.C. 552(b) and §4.15 of the Commission's Rules of Practice. Such presentations will be transcribed verbatim or



## PART 1 – GENERAL PROCEDURES

summarized at the discretion of the Commission and a copy of the transcript or summary and copies of any written communications and summaries of any oral communications relating to such presentations shall be placed on the rulemaking record.

### **§1.14 Promulgation.**

(a) The Commission, after review of the rulemaking record, may issue, modify, or decline to issue any rule. Where it believes that it should have further information or additional views of interested persons, it may withhold final action pending the receipt of such additional information or views. If it determines not to issue a rule, it may adopt and publish an explanation for not doing so.

(1) *Statement of Basis and Purpose.* If the Commission determines to promulgate a rule, it shall adopt a Statement of Basis and Purpose to accompany the rule which shall include:

(i) A statement as to the prevalence of the acts or practices treated by the rule;

(ii) A statement as to the manner and context in which such acts or practices are unfair or deceptive;

(iii) A statement as to the economic effect of the rule, taking into account the effect on small businesses and consumers;

(iv) A statement as to the effect of the rule on state and local laws; and

(v) A statement of the manner in which the public may obtain copies of the final regulatory analysis.

(2) *Final regulatory analysis.* Except as otherwise provided by statute, if the Commission determines to promulgate a final rule, it shall issue a final regulatory analysis relating to the final rule. Each final regulatory analysis shall contain:

(i) A concise statement of the need for, and the objectives of, the final rule;

(ii) A description of any alternatives to the final rule which were considered by the Commission;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(iii) An analysis of the projected benefits and any adverse economic effects and any other effects of the final rule;

(iv) An explanation of the reasons for the determination of the Commission that the final rule will attain its objectives in a manner consistent with applicable law and the reasons the particular alternative was chosen;

(v) A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues; and

(vi) The information required by the Regulatory Flexibility Act at 5 U.S.C. 604.

(b) In the event the Commission determines, upon its review of the rulemaking record, to propose a revised rule for further proceedings in accordance with this subpart, such proceedings, including the opportunity of interested persons to avail themselves of the procedures of §1.13 (d)(5) and (d)(6), shall be limited to those portions of the revised rule, the subjects and issues of which were not substantially the subject of comment in response to a previous notice of proposed rulemaking.

(c) The final rule and Statement of Basis and Purpose shall be published in the *Federal Register*. A rule issued under this subpart shall be deemed promulgated at 3 p.m. Eastern Standard Time on the fourth day after the date on which the final rule and Statement of Basis and Purpose are published in the *Federal Register*. In the event such day is a Saturday, Sunday or national holiday, then the rule is deemed promulgated at 3 p.m. Eastern Standard Time on the following business day.

### **§1.15 Amendment or repeal of a rule.**

(a) *Substantive amendment or repeal of a rule.* The procedures for substantive amendment to or repeal of a rule are the same as for the issuance thereof.

## PART 1 – GENERAL PROCEDURES

(b) *Nonsubstantive amendment of a rule.* The Commission may make a nonsubstantive amendment to a rule by announcing the amendment in the *Federal Register*.

**§1.16 Petition for exemption from trade regulation rule.** Any person to whom a rule would otherwise apply may petition the Commission for an exemption from such rule. The procedures for determining such a petition shall be those of subpart C of these rules.

### **§1.17 [Reserved]**

### **§1.18 Rulemaking record.**

(a) *Definition.* For purposes of these rules the term *rulemaking record* includes the rule, its Statement of Basis and Purpose, the verbatim transcripts of the informal hearing, written submissions, the recommended decision of the presiding officer, and the staff recommendations as well as any public comment thereon, verbatim transcripts or summaries of oral presentations to the Commission, any communications placed on the rulemaking record pursuant to §1.18c and any other information which the Commission considers relevant to the rule.

(b) *Public availability.* The rulemaking record shall be publicly available except when the presiding officer, for good cause shown, determines that it is in the public interest to allow any submission to be received *in camera* subject to the provisions of §4.11 of this chapter.

(c) *Communications to Commissioners and Commissioners' personal staffs.*

(1) *Communications by outside parties.* Except as otherwise provided in this subpart or by the Commission, after the Commission votes to issue an initial notice of proposed rulemaking, comment on the proposed rule should be directed to the presiding officer pursuant to §1.13. Communications with respect to the merits of that

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

proceeding from any outside party to any Commissioner or Commissioner advisor shall be subject to the following treatment:

(i) *Written communications.* Written communications, including written communications from members of Congress, received within the period for acceptance of initial written comments shall be forwarded promptly to the presiding officer for placement on the rulemaking record. Written communications received after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such communications comply with the applicable requirements for written submissions at that stage of the proceeding. Communications that comply with such requirements will be promptly placed on the rulemaking record. Noncomplying communications and all communications received after the time periods for acceptance of written submissions will be placed promptly on the public record.

(ii) *Oral communications.* Oral communications are permitted only when advance notice of such oral communications is published by the Commission's Office of Public Information in its *Weekly Calendar and Notice of "Sunshine" Meetings* and when such oral communications are transcribed verbatim or summarized at the discretion of the Commissioner or Commissioner advisor to whom such oral communications are made and are promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of oral communications which occur after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer together with any written communications and summaries of any oral communications relating to such oral communications. The presiding officer will determine whether such oral communications comply with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with

## PART 1 – GENERAL PROCEDURES

such requirements will be promptly placed on the rulemaking record together with any written communications and summaries of any oral communications relating to such oral communications. Transcripts or summaries of noncomplying oral communications will be promptly placed on the public record together with any written communications and summaries of any oral communications relating to such oral communications. No oral communications are permitted subsequent to the close of the postrecord comment period, except as provided in §1.13(i). If an oral communication does otherwise occur, the Commissioner or Commissioner advisor will promptly place on the public record either a transcript of the communication or a memorandum setting forth the contents of the communication and the circumstances thereof; such transcript or memorandum will not be part of the rulemaking record.

(iii) *Congressional communications.* The provisions of paragraph (c)(1)(ii) of this section do not apply to communications from members of Congress. Memoranda prepared by the Commissioner or Commissioner advisor setting forth the contents of any oral congressional communications will be placed on the public record. If the communication occurs within the initial comment period and is transcribed verbatim or summarized, the transcript or summary will be promptly placed on the rulemaking record. A transcript or summary of any oral communication which occurs after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the presiding officer, who will determine whether such oral communication complies with the applicable requirements for written submissions at that stage of the proceeding. Transcripts or summaries of oral communications that comply with such requirements will be promptly placed on the rulemaking record. Transcripts or summaries of noncomplying oral communications will be placed promptly on the public record.

(2) *Communications by certain officers, employees, and agents of the Commission.* Any officer, employee, or agent of the Commission

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

with investigative or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission is prohibited from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of *ex parte* matters as authorized by law.

**§1.19 Modification of a rule by the Commission at the time of judicial review.** In the event that a reviewing court determines under section 18(e)(2) of the Federal Trade Commission Act, to allow further submissions and presentations on the rule, the Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations. Such modified or new rule shall then be filed with the court together with an appropriate Statement of Basis and Purpose and the return of such submissions and presentations.

**§1.20 Alternative procedures.** If the Commission determines at the commencement of a rulemaking proceeding to employ procedures other than those established in the remainder of this subpart, it may do so by announcing those procedures in the *Federal Register* notice commencing the rulemaking proceeding.

## PART 1 – GENERAL PROCEDURES

### **Subpart C – Rules Promulgated Under Authority Other Than Section 18(a)(1)(B) of the FTC Act**

**§1.21 Scope of the rules in this subpart.** This subpart sets forth procedures for the promulgation of rules under authority other than section 18(a)(1)(B) of the FTC Act except as otherwise required by law or otherwise specified in the rules of this chapter. This subpart does not apply to the promulgation of industry guides, general statements of policy, rules of agency organization, procedure, or practice, or rules governed by subpart B of this part.

#### **§1.22 Rulemaking.**

(a) *Nature and authority.* For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices. Such rules and regulations express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.

(b) *Scope.* Rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular product or geographic markets, as may be appropriate.

(c) *Use of rules in adjudicative proceedings.* When a rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, *provided that* the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.

**§1.23 Quantity limit rules.** Quantity limit rules are authorized by section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. These rules have the force and effect of law.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§1.24 Rules applicable to wool, fur, and textile fiber products and rules promulgated under the Fair Packaging and Labeling Act.** Rules having the force and effect of law are authorized under section 6 of the Wool Products Labeling Act of 1939, section 8 of the Fur Products Labeling Act, section 7 of the Textile Fiber Products Identification Act, and sections 4, 5, and 6 of the Fair Packaging and Labeling Act.

**§1.25 Initiation of proceedings – petitions.** Proceedings for the issuance of rules or regulations, including proceedings for exemption of products or classes of products from statutory requirements, may be commenced by the Commission upon its own initiative or pursuant to petition filed with the Secretary by any interested person or group stating reasonable grounds therefor. Anyone whose petition is not deemed by the Commission sufficient to warrant the holding of a rulemaking proceeding will be promptly notified of that determination and given an opportunity to submit additional data. Procedures for the amendment or repeal of a rule or regulation are the same as for the issuance thereof.

### **§1.26 Procedure.**

(a) *Investigations and conferences.* In connection with any rulemaking proceeding, the Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of subpart A of part 2 of this chapter.

(b) *Notice.* General notice of proposed rulemaking will be published in the *Federal Register* and, to the extent practicable, otherwise made available to interested persons except when the Commission for good cause finds that notice and public procedure relating to the rule are impractical, unnecessary or contrary to the public interest and incorporates such finding and a brief statement of the reasons therefor in the rule. If the rulemaking proceeding was instituted pursuant to petition, a copy of the notice will be served on the petitioner. Such notice will include:



## PART 1 – GENERAL PROCEDURES

(1) A statement of the time, place, and nature of the public proceedings;

(2) Reference to the authority under which the rule is proposed;

(3) Either the terms or substance of the proposed rule or description of the subjects and issues involved;

(4) An opportunity for interested persons to participate in the proceeding through the submission of written data, views, or arguments; and

(5) A statement setting forth such procedures for treatment of communications from persons not employed by the Commission to Commissioners or Commissioner Advisors with respect to the merits of the proceeding as will incorporate the requirements of §1.18(c), including the transcription of oral communications required by §1.18(c)(2), adapted in such form as may be appropriate to the circumstances of the particular proceeding.

(c) *Oral hearings.* Oral hearing on a proposed rule may be held within the discretion of the Commission, unless otherwise expressly required by law. Any such hearing will be conducted by the Commission, a member thereof, or a member of the Commission's staff. At the hearing interested persons may appear and express their views as to the proposed rule and may suggest such amendments, revisions, and additions thereto as they may consider desirable and appropriate. The presiding officer may impose reasonable limitations upon the length of time allotted to any person. If by reason of the limitations imposed the person cannot complete the presentation of his suggestions, he may within twenty-four (24) hours file a written statement covering those relevant matters which he did not orally present.

(d) *Promulgation of rules or orders.* The Commission, after consideration of all relevant matters of fact, law, policy, and discretion, including all relevant matters presented by interested persons in the proceeding, will adopt and publish in the *Federal Register* an appropriate rule or order, together with a concise general statement of its basis and purpose and any necessary findings, or will give other appropriate public notice of disposition of the proceeding.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(e) *Effective date of rules.* Except as provided in paragraphs (f) and (g) of this section, the effective date of any rule, or of the amendment, suspension, or repeal of any rule will be as specified in a notice published in the *Federal Register*, which date will be not less than thirty (30) days after the date of such publication unless an earlier effective date is specified by the Commission upon good cause found and published with the rule.

(f) *Effective date of rules and orders under Fair Packaging and Labeling Act.* The effective date of any rule or order under the Fair Packaging and Labeling Act will be as specified by order published in the *Federal Register*, but shall not be prior to the day following the last day on which objections may be filed under paragraph (g) of this section.

(g) *Objections and request for hearing under Fair Packaging and Labeling Act.* On or before the thirtieth (30th) day after the date of publication of an order in the *Federal Register* pursuant to paragraph (f) of this section, any person who will be adversely affected by the order if placed in effect may file objections thereto with the Secretary of the Commission, specifying with particularity the provisions of the order deemed objectionable, stating the grounds therefor, and requesting a public hearing upon such objections. Objections will be deemed sufficient to warrant the holding of a public hearing only:

- (1) If they establish that the objector will be adversely affected by the order;
- (2) If they specify with particularity the provisions of the order to which objection is taken; and
- (3) If they are supported by reasonable grounds which, if valid and factually supported, may be adequate to justify the relief sought.

Anyone who files objections which are not deemed by the Commission sufficient to warrant the holding of a public hearing will be promptly notified of that determination. As soon as practicable after the time for filing objections has expired, the Commission will publish a notice in the *Federal Register* specifying those parts of the order which have been stayed by the filing of objections or, if no objections sufficient to warrant the holding of a hearing have been filed, stating that fact.

PART 1 – GENERAL PROCEDURES

**Subpart D – Administration of the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act**

**§1.31 Administration.** The general administration of the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act, and of the respective rules and regulations thereunder is carried out by the Bureau of Consumer Protection. Any interested person may obtain copies of the several Acts and rules and regulations upon request to the Secretary of the Commission.

**§1.32 Registered identification numbers.** Registered identification numbers are issued by the Commission under the provisions of Rule 4 of the rules and regulations under the Wool Products Labeling Act of 1939 (§300.4 of this chapter); Rule 26 of the rules and regulations under the Fur Products Labeling Act (§301.26 of this chapter); and Rule 20 of the rules and regulations under the Textile Fiber Products Identification Act (§303.20 of this chapter). Such numbers are for use as required identification in lieu of the name of the person to whom the number has been issued in satisfying the identification requirement in labeling under the respective Acts. Any person marketing wool products, textile fiber products, or fur or fur products, in commerce, may file an application with the Secretary of the Commission for issuance of a registered identification number. The Commission will furnish application forms upon request. Numbers are issued when, upon examination of the application, the applicant is found to come within the terms of the applicable rules and regulations. Numbers are subject to revocation for cause or upon a change in business status or discontinuance of business. The identity of holders of registered identification numbers issued by the Commission is released upon oral or written request directed to the Enforcement Division of the Bureau of Consumer Protection.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§1.33 Continuing guaranties.** Continuing guaranties may be filed with the Commission under section 9 of the Wool Products Labeling Act of 1939 and Rule 33 of the rules and regulations thereunder (§300.33 of this chapter); section 10 of the Fur Products Labeling Act and Rule 48 of the rules and regulations thereunder (§301.48 of this chapter); and section 10 of the Textile Fiber Products Identification Act and Rule 38 of the rules and regulations thereunder (§303.38 of this chapter). Upon receipt of continuing guaranties duly executed according to form and substance as prescribed in the applicable rules and regulations, they are filed and made public. Necessary forms may be obtained from the Commission upon request.

**§1.34 Inspections and counseling.** The Commission maintains a staff to carry on compliance inspection and industry counseling work among manufacturers and marketers of wool products, textile fiber products, and fur or fur products. Administrative action to effect correction of minor infractions on a voluntary basis is taken in those cases where such procedure is believed adequate to effect immediate compliance and protect the public interest.

## PART 1 – GENERAL PROCEDURES

### Subpart E – Export Trade Associations

**§1.41 Limited antitrust exemption.** The Export Trade Act authorizes the organization and operation of export trade associations, and extends to them certain limited exemptions from the Sherman Act and the Clayton Act. It also extends the jurisdiction of the Commission under the Federal Trade Commission Act to unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States.

**§1.42 Notice to Commission.** To obtain the exemptions afforded by the Act, an export trade association is required to file with the Commission, within thirty (30) days after its creation, a verified written statement setting forth the location of its offices and places of business, names, and addresses of its officers, stockholders, or members, and copies of its documents of incorporation or association. On the first day of January of each year thereafter, each association must file a like statement and, when required by the Commission to do so, must furnish to the Commission detailed information as to its organization, business, conduct, practices, management, and relation to other associations, corporations, partnerships, and individuals.

**§1.43 Recommendations.** Whenever the Commission has reason to believe that an association has violated the prohibitions of section 2 of the Act, it may conduct an investigation. If, after investigation, it concludes that the law has been violated, it may make to such association recommendations for the readjustment of its business. If the association fails to comply with the recommendations, the Commission will refer its findings and recommendations to the Attorney General for appropriate action.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### **Subpart F – Trademark Cancellation Procedure**

**§1.51 Applications.** Applications for the institution of proceedings for the cancellation of registration of trade, service, or certification marks under the Trade-Mark Act of 1946 may be filed with the Secretary of the Commission. Such applications shall be in writing, signed by or in behalf of the applicant, and should identify the registration concerned and contain a short and simple statement of the facts constituting the alleged basis for cancellation, the name and address of the applicant, together with all relevant and available information. If, after consideration of the application, or upon its own initiative, the Commission concludes that cancellation of the mark may be warranted, it will institute a proceeding before the Commissioner of Patents for cancellation of the registration.

## PART 1 – GENERAL PROCEDURES

### Subpart G – Injunctive and Condemnation Proceedings

**§1.61 Injunctions.** In those cases where the Commission has reason to believe that it would be to the interest of the public, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in section 13 of the Federal Trade Commission Act.

**§1.62 Ancillary court orders pending review.** Where petition for review of an order to cease and desist has been filed in a U.S. court of appeals, the Commission may apply to the court for issuance of such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*.

**§1.63 Injunctions: Wool, fur, and textile cases.** In those cases arising under the Wool Products Labeling Act of 1939, Fur Products Labeling Act, and Textile Fiber Products Identification Act, where it appears to the Commission that it would be to the public interest for it to do so, the Commission will apply to the courts for injunctive relief, pursuant to the authority granted in such Acts.

**§1.64 Condemnation proceedings.** In those cases arising under the Wool Products Labeling Act of 1939 and Fur Products Labeling Act, and where it appears to the Commission that the public interest requires such action, the Commission will apply to the courts for condemnation, pursuant to the authority granted in such Acts.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### **Subpart H – Administration of the Fair Credit Reporting Act**

**§1.71 Administration.** The general administration of the Fair Credit Reporting Act (Title VI of the Consumer Credit Protection Act of 1968; enacted October 26, 1970; Pub. L. 91-508, 82 Stat. 146, 15 U.S.C. 1601 *et seq.*) is carried out by the Bureau of Consumer Protection, Division of Credit Practices. Any interested person may obtain copies of the Act and these procedures and rules of practice upon request to the Secretary of the Commission, Washington, DC 20580.

**§1.72 Examination, counseling and staff advice.** The Commission maintains a staff to carry out on-the-scene examination of records and procedures utilized to comply with the Fair Credit Reporting Act and to carry out industry counseling. Requests for staff interpretation of the Fair Credit Reporting Act should be directed to the Division of Credit Practices, Bureau of Consumer Protection. Such interpretations represent informal staff opinion which is advisory in nature and is not binding upon the Commission as to any action it may take in the matter. Administrative action to effect correction of minor infractions on a voluntary basis is taken in those cases where such procedure is believed adequate to effect immediate compliance and protect the public interest.

#### **§1.73 Interpretations.**

(a) *Nature and purpose.*

(1) The Commission issues and causes to be published in the *Federal Register* interpretations of the provisions of the Fair Credit Reporting Act on its own initiative or pursuant to the application of any person when it appears to the Commission that guidance as to the legal requirements of the Act would be in the public interest and would serve to bring about more widespread and equitable observance of the Act.



## PART 1 – GENERAL PROCEDURES

(2) The interpretations are not substantive rules and do not have the force or effect of statutory provisions. They are guidelines intended as clarification of the Fair Credit Reporting Act, and, like industry guides, are advisory in nature. They represent the Commission's view as to what a particular provision of the Fair Credit Reporting Act means for the guidance of the public in conducting its affairs in conformity with that Act, and they provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with such interpretations may result in corrective action by the Commission under applicable statutory provisions.

(b) *Procedure.*

(1) Requests for Commission interpretations should be submitted in writing to the Secretary of the Federal Trade Commission stating the nature of the interpretation requested and the reasons and justification therefor. If the request is granted, as soon as practicable thereafter, the Commission will publish a notice in the *Federal Register* setting forth the text of the proposed interpretation. Comments, views, or objections, together with the grounds therefor, concerning the proposed interpretation may be submitted to the Secretary of the Commission within thirty (30) days of public notice thereof. The proposed interpretation will automatically become final after the expiration of sixty (60) days from the date of public notice thereof, unless upon consideration of written comments submitted as hereinabove provided, the Commission determine to rescind, revoke, modify, or withdraw the proposed interpretation, in which event notification of such determination will be published in the *Federal Register*.

(2) The issuance of such interpretations is within the discretion of the Commission and the Commission at any time may conduct such investigations and hold such conferences or hearings as it may deem appropriate. Any interpretation issued pursuant to this chapter is without prejudice to the right of the Commission to reconsider the interpretation, and where the public interest requires, to rescind,

#### ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

revoke, modify, or withdraw the interpretation, in which event notification of such action will be published in the *Federal Register*.

(c) Applicability of interpretations. Interpretations issued pursuant to this subpart may cover all applications of a particular statutory provision, or they may be limited in application to a particular industry, as appropriate.

## PART 1 – GENERAL PROCEDURES

### **Subpart I – Procedures for Implementation of the National Environmental Policy Act of 1969**

**§1.81 Authority and incorporation of CEQ Regulations.** This subpart is issued pursuant to 102(2) of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*). Pursuant to Executive Order 11514 (March 5, 1970, as amended by Executive Order 11991, May 24, 1977) and the Environmental Quality Improvement Act of 1980, as amended (42 U.S.C. 4371 *et seq.*) the Council on Environmental Quality (CEQ) has issued comprehensive regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500 through 1508) (“CEQ Regulations”). Although it is the Commission's position that these regulations are not binding on it, the Commission's policy is to comply fully with the CEQ Regulations unless it determines in a particular instance or for a category of actions that compliance would not be consistent with the requirements of law. With this caveat, the Commission incorporates into this subpart the CEQ Regulations. The following are supplementary definitions and procedures to be applied in conjunction with the CEQ Regulations.

#### **§1.82 Declaration of policy.**

(a) Except for actions which are not subject to the requirements of section 102(2)(C) of NEPA, no Commission proposal for a major action significantly affecting the quality of the human environment will be instituted unless an environmental impact statement has been prepared for consideration in the decisionmaking. All relevant environmental documents, comments, and responses as provided in this subpart shall accompany such proposal through all review processes. “Major actions, significantly affecting the quality of the human environment” referred to in this subpart “do not include bringing judicial or administrative civil or criminal enforcement actions” CEQ Regulation (40 CFR 1508.18(a)). In the event that the Commission in an administrative enforcement proceeding actively contemplates the adoption of standards or a form of relief which it

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

determines may have a significant effect on the environment, the Commission will, when consistent with the requirements of law, provide for the preparation of an environmental assessment or an environmental impact statement or such other action as will permit the Commission to assess alternatives with a view toward avoiding or minimizing any adverse effect upon the environment.

(b) No Commission proposal for legislation significantly affecting the quality of the human environment and concerning a subject matter in which the Commission has primary responsibility will be submitted to Congress without an accompanying environmental impact statement.

(c) When the Commission finds that emergency action is necessary and an environmental impact statement cannot be prepared in conformance with the CEQ Regulations, the Commission will consult with CEQ about alternative arrangements in accordance with CEQ Regulation (40 CFR 1506.11).

### **§1.83 Whether to commence the process for an environmental impact statement.**

(a) The Bureau responsible for submitting a proposed rule, guide, or proposal for legislation to the Commission for agency action shall, after consultation with the Office of the General Counsel, initially determine whether or not the proposal is one which requires an environmental impact statement. Except for matters where the environmental effects, if any, would appear to be either (1) clearly significant and therefore the decision is made to prepare an environmental impact statement, or (2) so uncertain that environmental analysis would be based on speculation, the Bureau should normally prepare an “environmental assessment” CEQ Regulation (40 CFR 1508.9) for purposes of providing sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. The Bureau should involve environmental agencies to the extent practicable in preparing an assessment. An environmental assessment shall be made available to the public when the proposed action is made public along with any

## PART 1 – GENERAL PROCEDURES

ensuing environmental impact statement or finding of no significant impact.

(b) If the Bureau determines that the proposal is one which requires an environmental impact statement, it shall commence the “scoping process” CEQ Regulation (40 CFR 1501.7) except that the impact statement which is part of a proposal for legislation need not go through a scoping process but shall conform to CEQ Regulation (40 CFR 1506.8). As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process, the Bureau shall publish a notice of intent as provided in CEQ Regulations (40 CFR 1501.7 and 1508.22).

(c) If, on the basis of an environmental assessment, the determination is made not to prepare a statement, a finding of “no significant impact” shall be made in accordance with CEQ Regulation (40 CFR 1508.3) and shall be made available to the public as specified in CEQ Regulation (40 CFR 1506.6).

**§1.84 Draft environmental impact statements: Availability and comment.** Except for proposals for legislation, environmental impact statements shall be prepared in two stages: Draft statement and final statement.

(a) *Proposed rules or guides.*

(1) An environmental impact statement, if deemed necessary, shall be in draft form at the time a proposed rule or guide is published in the *Federal Register* and shall accompany the proposal throughout the decisionmaking process.

(2) The major decision points with respect to rules and guides are:

(i) Preliminary formulation of a staff proposal;

(ii) The time the proposal is initially published in the *Federal Register* as a Commission proposal;

(iii) Presiding officer's report (in trade regulation rule proceedings);

(iv) Submission to the Commission of the staff report or recommendation for final action on the proposed guide or rule;

(v) Final decision by the Commission. The decision on whether or not to prepare an environmental impact statement should occur at

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

point (a)(2)(i) of this section. The publication of any draft impact statement should occur at point (a)(2)(ii) of this section. The publication of the final environmental impact statement should occur at point (a)(2)(iv) of this section.

(b) *Legislative proposals.* In legislative matters, a legislative environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1506.8).

(c) In rule or guide proceedings the draft environmental impact statement shall be prepared in accordance with CEQ Regulation (40 CFR 1502.9) and shall be placed in the public record to which it pertains; in legislative matters, the legislative impact statement shall be placed in a public record to be established, containing the legislative report to which it pertains; these will be available to the public through the Office of the Secretary and will be published in full with the appropriate proposed rule, guide, or legislative report; such statements shall also be filed with the Environmental Protection Agency's (EPA) Office of Environmental Review (CEQ Regulation (40 CFR 1506.9)) for listing in the weekly *Federal Register* Notice of draft environmental impact statements, and shall be circulated, in accordance with CEQ Regulations (40 CFR 1502.19, 1506.6) to appropriate federal, state and local agencies.

(d) Forty-five (45) days will be allowed for comment on the draft environmental impact statement, calculated from the date of publication in the EPA's weekly *Federal Register* list of draft environmental impact statements. The Commission may in its discretion grant such longer period as the complexity of the issues may warrant.

### **§1.85 Final environmental impact statements.**

(a) After the close of the comment period, the Bureau responsible for the matter will consider the comments received on the draft environmental impact statement and will put the draft statement into final form in accordance with the requirements of CEQ Regulation (40 CFR 1502.9(b)), attaching the comments received (or summaries if response was exceptionally voluminous).

## PART 1 – GENERAL PROCEDURES

(b) Upon Bureau approval of the final environmental impact statement the final statement will be

- (1) Filed with the EPA;
- (2) Forwarded to all parties which commented on the draft environmental impact statement and to other interested parties, if practicable;
- (3) Placed in the public record of the proposed rule or guide proceeding or legislative matter to which it pertains;
- (4) Distributed in any other way which the Bureau in consultation with CEQ deems appropriate.

(c) In rule and guide proceedings, at least thirty (30) days will be allowed for comment on the final environmental impact statement, calculated from the date of publication in the EPA's weekly *Federal Register* list of final environmental impact statements. In no event will a final rule or guide be promulgated prior to ninety (90) days after notice of the draft environmental impact statement, except where emergency action makes such time period impossible.

**§1.86 Supplemental statements.** Except for proposals for legislation, as provided in CEQ Regulation (40 CFR 1502.9(c)), the Commission shall publish supplements to either draft or final environmental statements if:

- (a) The Commission makes substantial changes in the proposed action that are relevant to environmental concerns; or
- (b) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action and its impacts. In the course of a trade regulation rule proceeding, the supplement will be placed in the rulemaking record.

**§1.87 NEPA and agency decisionmaking.** In its final decision on the proposed action or, if appropriate, in its recommendation to Congress, the Commission shall consider all the alternatives in the environmental impact statement and other relevant environmental documents and shall prepare a concise statement which, in accordance with CEQ Regulation §1505.2, shall:

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(a) Identify all alternatives considered by the Commission in reaching its decision or recommendation, specifying the alternatives which were considered to be environmentally preferable;

(b) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not.

### **§1.88 Implementing procedures.**

(a) The General Counsel is designated the official responsible for coordinating the Commission's efforts to improve environmental quality. He will provide assistance to the staff in determining when an environmental impact statement is needed and in its preparation.

(b) The Commission will determine finally whether an action complies with NEPA.

(c) The Directors of the Bureaus of Consumer Protection and Competition will supplement these procedures for their Bureaus to assure that every proposed rule and guide is reviewed to assess the need for an environmental impact statement and that, where need exists, an environmental impact statement is developed to assure timely consideration of environmental factors.

(d) The General Counsel will establish procedures to assure that every legislative proposal on a matter for which the Commission has primary responsibility is reviewed to assess the need for an environmental impact statement and that, where need exists, an environmental impact statement is developed to assure timely consideration of environmental factors.

(e) Parties seeking information or status reports on environmental impact statements and other elements of the NEPA process, should contact the Assistant General Counsel for Litigation and Environmental Policy.

**§1.89 Effect on prior actions.** It is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings which are already in progress.



## PART 1 – GENERAL PROCEDURES

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart J – Economic Surveys, Investigations and Reports**

**§1.91 Authority and purpose.** General and special economic surveys, investigations, and reports are made by the Bureau of Economics under the authority of the various laws which the Federal Trade Commission administers. The Commission may in any such survey or investigation invoke any or all of the compulsory processes authorized by law.

## PART 1 – GENERAL PROCEDURES

### Subpart K – Penalties for Violation of Appliance Labeling Rules

**§1.92 Scope.** The rules in this subpart apply to and govern proceedings for the assessment of civil penalties for the violation of section 332 of the Energy Policy and Conservation Act, 42 U.S.C. 6302, and the Commission's Rules on Labeling and Advertising of Consumer Appliances, 16 CFR part 305, promulgated under sections 324 and 326 of the Energy Policy and Conservation Act, 42 U.S.C. 6294 and 6296.

#### **§1.93 Notice of proposed penalty.**

(a) *Notice.* Before issuing an order assessing a civil penalty under this subpart against any person, the Commission shall provide to such person notice of the proposed penalty. This notice shall:

(1) Inform such person of the opportunity to elect in writing within 30 days of receipt of the notice of proposed penalty to have procedures of §1.95 (in lieu of those of §1.94) apply with respect to such assessment; and

(2) Include a copy of a proposed complaint conforming to the provision of §3.11(b)(1) and (2) of the Commission's Rules of Practice, or a statement of the material facts constituting the alleged violation and the legal basis for the proposed penalty; and

(3) Include the amount of the proposed penalty; and

(4) Include a statement of the procedural rules that the Commission will follow if respondent elects to proceed under §1.94 unless the Commission chooses to follow subparts B, C, D, E, and F of part 3 of this chapter.

(b) *Election.* Within 30 days of receipt of the notice of proposed penalty, the respondent shall, if it wishes to elect to have the procedures of §1.95 apply, notify the Commission of the election in writing. The notification, to be filed in accordance with §4.2 of this chapter, may include any factual or legal reasons for which the proposed assessment order should not issue, should be reduced in amount, or should otherwise be modified.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§1.94 Commission proceeding to assess civil penalty.** If the respondent fails to elect to have the procedures of §1.95 apply, the Commission shall determine whether to issue a complaint and thereby commence an adjudicative proceeding in conformance with section 333(d)(2)(A) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(d)(2)(A). If the Commission votes to issue a complaint, the proceeding shall be conducted in accordance with subparts B, C, D, E and F of part 3 of this chapter, unless otherwise ordered in the notice of proposed penalty. In assessing a penalty, the Commission shall take into account the factors listed in §1.97.

### **§1.95 Procedures upon election.**

(a) After receipt of the notification of election to apply the procedures of this section pursuant to §1.93, the Commission shall promptly assess such penalty as it deems appropriate, in accordance with §1.97.

(b) If the civil penalty has not been paid within 60 calendar days after the assessment order has been issued under paragraph (a) of this section, the General Counsel, unless otherwise directed, shall institute an action in the appropriate district court of the United States for an order enforcing the assessment of the civil penalty.

(c) Any election to have this section apply may not be revoked except with the consent of the Commission.

**§1.96 Compromise of penalty.** The Commission may compromise any penalty or proposed penalty at any time, with leave of court when necessary, taking into account the nature and degree of violation and the impact of a penalty upon a particular respondent.

**§1.97 Amount of penalty.** All penalties assessed under this subchapter shall be in the amount per violation as described in section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a), adjusted for inflation pursuant to §1.98, unless the

## PART 1 – GENERAL PROCEDURES

Commission otherwise directs. In considering the amount of penalty, the Commission shall take into account:

- (a) Respondent's size and ability to pay;
- (b) Respondent's good faith;
- (c) Any history of previous violations;
- (d) The deterrent effect of the penalty action;
- (e) The length of time involved before the Commission was made aware of the violation;
- (f) The gravity of the violation, including the amount of harm to consumers and the public caused by the violation; and
- (g) Such other matters as justice may require.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart L – Civil Penalty Adjustments  
Under the Debt Collection Improvement Act of 1996**

**§1.98 Adjustment of civil monetary penalty amounts.** Effective November 20, 1996, dollar amounts specified in civil monetary penalty provisions within the Commission's jurisdiction are adjusted for inflation in accordance with paragraphs (a) through (l) of this section. The adjustments set forth in this section apply to violations occurring after November 20, 1996. The adjustments are as follows:

(a) Clayton Act section 7A(g)(1), 15 U.S.C. 18a(g)(1), adjusted from \$10,000 to \$11,000 per violation;

(b) Clayton Act section 11(l), 15 U.S.C. 21(l), adjusted from \$5,000 to \$5,500 per violation;

(c) FTC Act section 5(l), 15 U.S.C. 45(l), adjusted from \$10,000 to \$11,000 per violation;

(d) FTC Act section 5(m)(1)(A), 15 U.S.C. 45(m)(1)(A), adjusted from \$10,000 to \$11,000 per violation;

(e) FTC Act section 5(m)(1)(B), 15 U.S.C. 45(m)(1)(B), adjusted from \$10,000 to \$11,000 per violation;

(f) FTC Act section 10, 15 U.S.C. 50, adjusted from \$100 to \$110 per violation;

(g) Webb-Pomerene (Export Trade) Act section 5, 15 U.S.C. 65, adjusted from \$100 to \$110 per violation;

(h) Wool Products Labeling Act section 6(b), 15 U.S.C. 68d(b), adjusted from \$100 to \$110 per violation;

(i) Fur Products Labeling Act section 3(e), 15 U.S.C. 69a(e), adjusted from \$100 to \$110 per violation;

(j) Fur Products Labeling Act section 8(d)(2), 15 U.S.C. 69f(d)(2), adjusted from \$100 to \$110 per violation;

(k) Energy Policy and Conservation Act section 333(a), 42 U.S.C. 6303(a), adjusted from \$100 to \$110 per violation; and

(l) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission, adjusted in accordance with paragraphs (c), (d), (e) and (f) of this section, as applicable.

## **PART 2 – NONADJUDICATIVE PROCEDURES**

### **Subpart A – Inquiries; Investigations; Compulsory Processes**

**§2.1 How initiated.** Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaint by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations.

#### **§2.2 Request for Commission action.**

(a) Any individual, partnership, corporation, association, or organization may request the Commission to institute an investigation in respect to any matter over which the Commission has jurisdiction.

(b) Such request should be in the form of a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of. No forms or formal procedures are required.

(c) The person making the request is not regarded as a party to any proceeding which might result from the investigation.

(d) It is the general Commission policy not to publish or divulge the name of an applicant or complaining party except as required by law or by the Commission's rules. Where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission, in the course of a referral of the complaint or of an investigation, may disclose the identity of the complainant or complainants. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes which it administers.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§2.3 Policy as to private controversies.** The Commission acts only in the public interest and does not initiate an investigation or take other action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public.

**§2.4 Investigational policy.** The Commission encourages voluntary cooperation in its investigations. Where the public interest requires, however, the Commission may, in any matter under investigation adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law.

**§2.5 By whom conducted.** Inquiries and investigations are conducted under the various statutes administered by the Commission by Commission representatives designated and duly authorized for the purpose. Such representatives are “examiners” or “Commission investigators” within the meaning of the Federal Trade Commission Act and are authorized to exercise and perform the duties of their office in accordance with the laws of the United States and the regulations of the Commission. Included among such duties is the administration of oaths and affirmations in any matter under investigation by the Commission.

**§2.6 Notification of purpose.** Any person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation.

### **§2.7 Compulsory process in investigations.**

(a) *In general.* The Commission or any member thereof may pursuant to a Commission resolution, issue a subpoena or a civil investigative demand directing the person named therein to appear before a designated representative at a designated time and place to



## PART 2 – NONADJUDICATIVE PROCEDURES

testify or to produce documentary evidence, or both, or, in the case of a civil investigative demand, to provide a written report or answers to questions relating to any matter under investigation by the Commission. Material for which a civil investigative demand has been issued shall be made available for inspection and copying at the principal place of business of the person or at such other place or in such other manner as the person and the custodian designated pursuant to §2.16 agree.

(b) *Civil investigative demands.* Civil investigative demands shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices within the meaning of FTC Act section 5(a)(1).

(1) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Production of documentary material in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(2) Civil investigative demands for tangible things will describe each class of tangible things to be produced with such definiteness and certainty as to permit such things to be fairly identified, prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the custodian to whom such things shall be submitted. Submission of tangible things in response to a civil investigative demand shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(3) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted. Response to a civil investigative demand for a written report or answers to questions shall be made in accordance with the procedures prescribed by section 20(c)(13) of the Federal Trade Commission Act.

(4) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures prescribed by section 20(c)(14) of the Federal Trade Commission Act.

(c) The Bureau Director, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors, and Assistant Regional Directors, are authorized to negotiate and approve the terms of satisfactory compliance with subpoenas and civil investigative demands and, for good cause shown, may extend the time prescribed for compliance. Specifically, the subpoena power conferred by Section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) is included within this delegation.

(d) *Petitions to limit or quash.*

(1) *General.* Any petition to limit or quash any investigational subpoena or civil investigative demand shall be filed with the Secretary of the Commission within twenty (20) days after service of the subpoena or civil investigative demand, or, if the return date is less than twenty (20) days after service, prior to the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the subpoena or civil investigative demand,

## PART 2 – NONADJUDICATIVE PROCEDURES

including all appropriate arguments, affidavits and other supporting documentation.

(2) *Statement.* Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

(3) *Extensions of time.* Bureau Directors, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors in the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file such petitions.

(4) *Disposition.* A Commissioner, to be designated by the Chairman, is delegated, without power of redelegation, the authority to rule upon petitions to limit or quash an investigational subpoena or civil investigative demand, but the designated Commissioner may, in his or her sole discretion, refer a petition to the full Commission for determination.

(e) *Stay of compliance period.* The timely filing of a petition to limit or quash any investigational subpoena or civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

(f) *Review.* Any petitioner, within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition, may file with the Secretary of the Commission a request that the full Commission review the ruling. The

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

timely filing of such a request shall not stay the return date specified in the ruling, unless otherwise specified by the Commission.

(g) *Public disclosure.* All petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter.

### **§2.8 Investigational hearings.**

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Commission or the manner in which decrees in suits brought by the United States under the antitrust laws are being carried out, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Export Trade Act.

(b) Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. Such hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.

(c) Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. A copy of the transcript shall promptly be forwarded by the Commission investigator to the custodian designated in §2.16.

## PART 2 – NONADJUDICATIVE PROCEDURES

### **§2.8A Withholding requested material.**

(a) Any person withholding material responsive to an investigational subpoena or civil investigative demand issued pursuant to §2.7, an access order issued pursuant to §2.11, an order to file a report issued pursuant to §2.12, or any other request for production of material issued under this part, shall assert a claim of privilege or any similar claim not later than the date set for the production of material. Such person shall, if so directed in the subpoena, civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material solely for reasons described in §2.8A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

### **§2.9 Rights of witnesses in investigations.**

(a) Any person compelled to submit data to the Commission or to testify in an investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him and of his own testimony as stenographically reported, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of his testimony. Where the investigational hearing has been conducted pursuant to a civil investigative demand issued under section 20 of the Federal Trade Commission Act, upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his testimony. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

witness unless the witness cannot be found, is ill, waives in writing his right to signature or refuses to sign. If the transcript is not signed by the witness within thirty days of his being afforded a reasonable opportunity to review it, the Commission investigator shall take the actions prescribed by section 20(c)(12)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness. If the witness refuses to answer a question, then counsel may briefly state on the record if he has advised the witness not to answer the question and the legal grounds for such refusal.

(2) Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged to refuse to answer a question or to produce other evidence, the witness or counsel for the witness may object on the record to the question or requirement and may state briefly and precisely the ground therefor. The witness and his counsel shall not otherwise object to or refuse to answer any question, and they shall not otherwise interrupt the oral examination.

(3) Any objections made under the rules in this part will be treated as continuing objections and preserved throughout the further course of the hearing without the necessity for repeating them as to any similar line of inquiry. Cumulative objections are unnecessary. Repetition of the grounds for any objection will not be allowed.

(4) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b) (1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena or civil investigative demand must have been addressed to the

## PART 2 – NONADJUDICATIVE PROCEDURES

Commission in advance of the hearing. Copies of such petitions may be filed as part of the record of the investigation with the person conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(5) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the investigational hearing to permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the hearing.

(6) The person conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Commission, acting pursuant to §4.1(e) of this chapter, will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission or exclusion from further participation in the particular investigation.

**§2.10 Depositions.** In investigations other than those conducted under section 20 of the Federal Trade Commission Act, the Commission may order testimony to be taken by deposition at any stage of such investigation. Such depositions may be taken before any person having power to administer oaths who may be designated by the Commission. The testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed to by the deponent. Any person may be compelled to appear and be deposed and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence as provided in §§2.7 through 2.9.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### **§2.11 Orders requiring access.**

(a) In investigations other than those conducted under section 20 of the Federal Trade Commission Act, the Commission may issue an order requiring any person, partnership or corporation being investigated to grant access to files for the purpose of examination and the right to copy any documentary evidence. The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring access issued during the investigation of any matter.

(b) Any petition to limit or quash an order requiring access shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order requiring access, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring access shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring access.

(c) The timely filing of any petition to limit or quash such an order shall stay the requirement of compliance if the Commission has not ruled upon the motion by the date of compliance. If it rules on or subsequent to the date required for compliance and its ruling denies the petition in whole or in part, the Commission shall specify a new date of compliance.



## PART 2 – NONADJUDICATIVE PROCEDURES

(d) All petitions to limit or quash orders requiring access, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter.

### **§2.12 Reports.**

(a) In investigations other than those covered by section 20 of the Federal Trade Commission Act the Commission may issue an order requiring a person, partnership, or corporation to file a report or answers in writing to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(b) The Directors, Deputy Directors and Assistant Directors of the Bureaus of Competition and Economics, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and the Regional Directors and Assistant Regional Directors of the Commission's regional offices, pursuant to delegation of authority by the Commission, without power of redelegation, are authorized, for good cause shown, to extend the time prescribed for compliance with orders requiring reports or answers to questions issued during the investigation, study or survey of any matter or in connection with any of the Commission's reporting programs.

(c) Any petition to limit or quash an order requiring a report or answer to specific questions shall be filed with the Secretary of the Commission within twenty (20) days after service of the order, or, if the date for compliance is less than twenty (20) days after service of the order, then before the return date. Such petition shall set forth all assertions of privilege or other factual and legal objections to the order requiring a report or answer to specific questions, including all appropriate arguments, affidavits and other supporting documentation. All petitions to limit or quash orders requiring reports or answers to questions shall be ruled upon by the Commission itself, but the above-designated Directors, Deputy Directors, Assistant Directors, Associate Directors, Regional Directors and Assistant Regional

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

Directors are delegated, without power of redelegation, the authority to rule upon motions for extensions of time within which to file petitions to limit or quash orders requiring reports or answers to questions.

(d) Except as otherwise provided by the Commission, the timely filing of any petition to limit or quash such an order shall stay the requirement of return on the portion challenged if the Commission has not ruled upon the petition by the return date. If it rules on or subsequent to the return date and its ruling denies the petition in whole or in part, the Commission shall specify a new return date.

(e) All petitions to limit or quash orders requiring a report or answers to specific questions, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter.

### **§2.13 Noncompliance with compulsory processes.**

(a) In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, or penalties or criminal actions.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized:

(1) To institute, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a person, partnership, or corporation to comply with, or to obey, a subpoena, or civil investigative demand if the return date or any extension thereof has passed;

(2) To approve and have prepared and issued, in the name of the Commission when deemed appropriate by the General Counsel, a notice of default in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed;

## PART 2 – NONADJUDICATIVE PROCEDURES

(3) To institute, on behalf of the Commission, an enforcement proceeding and to request, on behalf of the Commission, the institution, when deemed appropriate by the General Counsel, of a civil action in connection with the failure of a person, partnership, or corporation to timely file a report pursuant to an order under section 6(b) of the Federal Trade Commission Act, if the return date or any extension thereof has passed; and

(4) To seek civil contempt in cases where a court order enforcing compulsory process has been violated.

### **§2.14 Disposition.**

(a) When the facts disclosed by an investigation indicate that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, further proceedings may be instituted pursuant to the provisions of part 3 of this chapter.

(b) When the facts disclosed by an investigation indicate that corrective action is not necessary or warranted in the public interest, the investigational file will be closed. The matter may be further investigated at any time if circumstances so warrant.

(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, and Regional Directors, without power of redelegation, limited authority to close investigations.

### **§2.15 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) The Bureau Director, Deputy Directors, and Assistant Directors in the Bureaus of Competition and Economics, the Bureau Director, Deputy Directors and Associate Directors of the Bureau of Consumer Protection, Regional Directors and Assistant Regional Directors are hereby authorized to request, through the Commission's liaison officer, approval from the Attorney General for the issuance of

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

an order requiring a witness to testify or provide other information granting immunity under title 18, section 6002, of the United States Code.

(b) The Commission retains the right to review the exercise of any of the functions delegated under paragraph (a) of this section. Appeals to the Commission from an order requiring a witness to testify or provide other information will be entertained by the Commission only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Such appeals shall be made on the record and shall be in the form of a brief not to exceed fifteen (15) pages in length and shall be filed within five (5) days after notice of the complained of action. The appeal shall not operate to suspend the hearing unless otherwise determined by the person conducting the hearing or ordered by the Commission.

### **§2.16 Custodians.**

(a) *Designation.* The Commission shall designate a custodian and one or more deputy custodians for material to be delivered pursuant to compulsory process in a investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. The custodian shall have the powers and duties prescribed by section 21 of the FTC Act. Deputy custodians may perform all of the duties assigned to custodians. The appropriate Bureau Directors, Deputy Directors, Associate Directors in the Bureau of Consumer Protection, Assistant Directors in the Bureau of Competition, Regional Directors or Assistant Regional Directors shall take the action required by section 21(b)(7) of the FTC Act if it is necessary to replace a custodian or deputy custodian.

(b) *Copying of custodial documents.* The custodian designated pursuant to section 21 of the Federal Trade Commission Act (subject to the general supervision of the Executive Director) may, from among the material submitted, select the material the copying of which is necessary or appropriate for the official use of the Commission, and

## PART 2 – NONADJUDICATIVE PROCEDURES

shall determine, the number of copies of any such material that are to be reproduced. Copies of material in the physical possession of the custodian may be reproduced by or under the authority of an employee of the Commission designated by the custodian.

(c) Material produced pursuant to the Federal Trade Commission Act, while in the custody of the custodian, shall be for the official use of the Commission in accordance with the Act; but such material shall upon reasonable notice to the custodian be made available for examination by the person who produced such material, or his duly authorized representative, during regular office hours established for the Commission.

### **Subpart B – [Reserved]**

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart C – Consent Order Procedure**

**§2.31 Opportunity to submit a proposed consent order.**

(a) Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit through the operating Bureau or Regional Office having responsibility in the matter a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated and complying with the requirements of §2.32, for consideration by the Commission in connection with a proposed complaint submitted by the Commission's staff.

(b) After a complaint has been issued, the consent order procedure described in this part will not be available except as provided in §3.25(b).

**§2.32 Agreement.** Every agreement shall contain, in addition to an appropriate order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. In addition, every agreement shall contain waivers of further procedural steps and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order. The agreement shall also contain provisions that the complaint may be used in construing the terms of the order, and that no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order; that the order shall have the same force and effect and may be altered, modified, or set aside in the same manner provided by statute for other orders; that the order shall become final upon service; that the agreement shall not become a part of the public record unless and until it is accepted by the Commission; and, if the agreement is accepted,

## PART 2 – NONADJUDICATIVE PROCEDURES

that the Commission will place the order contained therein on the public record for a period of sixty (60) days for the receipt and consideration of comments or views from any interested person; and that the Commission thereafter may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding. In addition, in appropriate circumstances the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint.

**§2.33 Compliance procedure.** The Commission may in its discretion require that a proposed agreement containing an order to cease and desist be accompanied by an initial report signed by the respondent setting forth in precise detail the manner in which the respondent will comply with the order when and if entered. Such report will not become part of the public record unless and until the accompanying agreement and order are accepted by the Commission. At the time any such report is submitted a respondent may request confidentiality for any portion thereof with a precise showing of justification therefore, and the General Counsel with due regard to statutory restrictions, the Commission's rules, and the public interest will act upon such request.

**§2.34 Disposition.** Upon receiving an executed agreement conforming with the requirements of §2.32, the Commission may: Accept it; reject it and issue its complaint; or take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein and any initial report of compliance submitted pursuant to §2.33 on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby, and any

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the explanation in the *Federal Register*. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.



## PART 2 – NONADJUDICATIVE PROCEDURES

### Subpart D – Reports of Compliance

#### **§2.41 Reports of compliance.**

(a) In every proceeding in which the Commission has issued an order pursuant to the provisions of section 5 of the Federal Trade Commission Act or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules in this chapter, a report in writing, signed by the respondent, setting forth in detail the manner and form of his compliance with the order, and shall thereafter file with the Commission such further signed, written reports of compliance as it may require. Reports of compliance shall be under oath if so requested. Where the order prohibits the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from its use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, or in any other case where the circumstances so warrant, the order may provide for an interim report stating whether and how respondents intend to comply to be filed within ten (10) days after service of the order. Neither the filing of an application for stay pursuant to §3.56, nor the filing of a petition for judicial review, shall operate to postpone the time for filing a compliance report under the order or this section. If the Commission, or a court, determines to grant a stay of an order, or portion thereof, pending judicial review, or if any order provision is automatically stayed by statute, no compliance report shall be due as to those portions of the order that are stayed unless ordered by the court. Thereafter, as to orders, or portions thereof, that are stayed, the time for filing a report of compliance shall begin to run *de novo* from the final judicial determination, except that if no petition for *certiorari* has been filed following affirmance of the order of the Commission by a court of

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition. Staff of the Bureaus of Competition and Consumer Protection will review such reports of compliance and may advise each respondent whether the staff intends to recommend that the Commission take any enforcement action. The Commission may, however, institute proceedings, including certification of facts to the Attorney General pursuant to the provisions of section 5(l) of the Federal Trade Commission Act (15 U.S.C. 45(l)) and section 11(1) of the Clayton Act, as amended (15 U.S.C. 21(1)), to enforce compliance with an order, without advising a respondent whether the actions set forth in a report of compliance evidence compliance with the Commission's order or without prior notice of any kind to a respondent.

(b) The Commission has delegated to the Director, the Deputy Directors, and the Assistant Director for Compliance of the Bureau of Competition, and to the Director, the Deputy Directors, and the Associate Director for Enforcement of the Bureau of Consumer Protection the authority to monitor compliance reports and to open and close compliance investigations. With respect to any compliance matter which has received previous Commission consideration as to compliance or in which the Commission or any Commissioner has expressed an interest, any matter proposed to be closed by reason of expense of investigation or testing, or any matter involving substantial questions as to the public interest, Commission policy or statutory construction, the Bureaus shall submit an analysis to the Commission regarding their intended actions.

(c) The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition and to the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection, and to the Regional Directors, the authority, for good cause shown, to extend the time within which reports of compliance with orders to cease and desist may be filed. It is to be noted, however, that an extension of time within which a report of compliance may be filed, or the filing of a report which does

## PART 2 – NONADJUDICATIVE PROCEDURES

not evidence full compliance with the order, does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to compliance with such order. An order of the Commission to cease and desist becomes final on the date and under the conditions provided in the Federal Trade Commission Act and the Clayton Act. Any person, partnership or corporation against which an order to cease and desist has been issued who is not in full compliance with such order on and after the date provided in these statutes for the order to become final is in violation of such order and is subject to an immediate action for civil penalties. The authority under this paragraph may not be redelegated, except that the Associate Director for Enforcement in the Bureau of Consumer Protection and the Assistant Director for Compliance in the Bureau of Competition may each name a designee under this paragraph.

(d) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order. A request ordinarily will be considered inappropriate for such advice:

(1) Where the course of action is already being followed by the requesting party;

(2) Where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or

(3) Where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

only after extensive investigation, clinical study, testing or collateral inquiry.

Furthermore, the filing of a request for advice under this paragraph does not in any circumstances suspend or relieve a respondent from his obligation under the law with respect to his compliance with the order. He must in any event be in full compliance on and after the date the order becomes final as prescribed by statute referred to in paragraph (b) of this section. Advice to respondents under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under §1.4 of this chapter.

(e) The Commission may at any time reconsider any advice given under this section and, where the public interest requires, rescind or revoke its prior advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. The Commission will not proceed against a respondent for violation of an order with respect to any action which was taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's advice.

(f) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the General Counsel, with due regard to statutory restrictions, the Commission's rules, and the public interest, has determined should not be made public. Within thirty (30) days after such requests and materials are placed on the public record, any person may file formal written objections or comments with the

## PART 2 – NONADJUDICATIVE PROCEDURES

Secretary of the Commission. Such objections or comments shall be placed on the public record except for information for which confidentiality has been requested, with a showing of justification therefor, and which the General Counsel with due regard to statutory restrictions, the Commission's rules, and the public interest, has determined should not be made public. Additionally, any communications, written or oral, concerning such proposed transactions, received by any individual member of the Commission, or by any employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth the full contents of such communication and the circumstances thereof, and such memorandum will immediately be placed on the public record. All responses to applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with a statement of supporting reasons, will be published when made.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart E – Requests to Reopen**

**§2.51 Requests to reopen.**

(a) *Scope.* Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part.

(b) *Contents.* A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions or the public interest require the requested modifications of the rule of order. Each affidavit shall set forth facts that would be admissible in evidence and shall show that the affiant is competent to testify to the matters stated therein. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.

(c) *Opportunity for public comment.* A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued. Bureau Directors are authorized to publish a notice in the *Federal Register* announcing the receipt of a request to reopen at their discretion. The public is invited to comment on the request while it is on the public record.

(d) *Determination.* After the period for public comments on a request under this section has expired and no later than one hundred

## PART 2 – NONADJUDICATIVE PROCEDURES

and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with paragraph (b) of this section and whether the proceeding shall be reopened and the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to §3.72, or take such other action as is appropriate: *Provided, however,* That any action under §3.72 or otherwise shall be concluded within the specified 120-day period.

## **PART 3 – RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS**

### **Subpart A – Scope of Rules; Nature of Adjudicative Proceedings**

**§3.1 Scope of the rules in this part.** The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay.

**§3.2 Nature of adjudicative proceedings.** Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act and proceedings for the assessment of civil penalties pursuant to §1.94 of this chapter. It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; proceedings for fixing quantity limits under section 2(a) of the Clayton Act; investigations under section 5 of the Export Trade Act; rulemaking proceedings under the Fair Packaging and Labeling Act up to the time when the Commission determines under §1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed; or the promulgation of substantive rules and regulations, determinations of classes of products exempted from statutory requirements, the establishment of name guides, or inspections and industry counseling, under sections 4(d) and 6(a) of the Wool Products Labeling Act of 1939, sections 7, 8(b), and 8(c) of the Fur



ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

Products Labeling Act, and sections 7(c), 7(d), and 12(b) of the Textile Fiber Products Identification Act.

## PART 3 – ADJUDICATIVE PROCEEDINGS

### Subpart B – Pleadings

#### **§3.11 Commencement of proceedings.**

(a) *Complaint.* Except as provided in §3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint.* The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

(c) *Motion for more definite statement.* Where the respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, the respondent may move for a more definite statement of the charges against it before filing an answer. Such a motion shall be filed within ten (10) days after service of the complaint and shall point out the defects complained of and the details desired.

#### **§3.11A Fast track proceedings.**

(a) *Availability of fast track proceedings.* In certain administrative proceedings that have been designated by the Commission as appropriate for the fast track schedule, respondents may elect to have the proceeding adjudicated under the expedited schedule set forth in this section. In administrative proceedings involving multiple respondents, the fast track schedule shall be available only if all respondents elect

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

it. The Commission shall designate whether the fast track schedule will be available at the time it authorizes Commission staff to seek a preliminary injunction in federal district court and shall provide notice of the defendant's option to elect the fast track procedures in the event that the Commission should initiate an administrative adjudication challenging some or all of the same conduct at issue in the federal court injunctive proceeding. Such notice shall be provided to the prospective respondent at the time it is notified of the Commission's action to authorize the filing of the preliminary injunction motion. In fast track proceedings, the Commission shall be prepared to issue a final order and opinion within thirteen (13) months after the latest of the following events (hereinafter "triggering event"): Issuance of the Commission's administrative complaint; entry of a preliminary injunction by a federal court in a collateral proceeding against respondent brought by the Commission; or the date on which respondent elects the fast track procedure. The date for issuance of the Commission's final order and opinion in fast track proceedings may be amended by the Commission in the following circumstances: If the Commission's final order or opinion contains material or information designated for *in camera* treatment such that the agency is required to provide advance notification of such disclosure to submitters of *in camera* material or information; or if the Commission determines that adherence to the thirteen-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of the fast track proceeding. Only administrative proceedings challenging conduct that has been preliminarily enjoined by a federal court in a collateral proceeding brought by the Commission shall be subject to the fast track schedule. In the event the preliminary injunction in the collateral federal court proceeding is vacated, the Commission, in its discretion, may take such action as it deems appropriate in the administrative adjudication. Except as modified by this section, the rules contained in subparts A through I of part 3 of this chapter shall govern fast track procedures in adjudicative proceedings.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(b) *Election of fast track proceedings.* Respondents making an election under this section shall make such election by the later of either: Three (3) days after service of the administrative complaint challenging the merger or acquisition; or three (3) days after a federal district court grants the Commission's request for a preliminary injunction. Respondents electing fast track proceedings shall do so by filing a notice of election of such expedited proceedings with the Secretary.

(c) *Interim deadlines in fast track proceedings.* The following deadlines shall govern all fast track proceedings covered by this section:

(1) The scheduling conference required by §3.21(b) shall be held not later than three (3) days after the triggering event.

(2) Respondent's answer shall be filed within fourteen (14) days after the triggering event.

(3) The ALJ shall file an initial decision within fifty-six (56) days following the conclusion of the evidentiary hearing. The initial decision shall be filed no later than one hundred ninety-five (195) days after the triggering event, pursuant to paragraph (a) of this section.

(4) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three (3) days after service of the initial decision. The notice shall comply with §3.52(a) in all other respects.

(5) The appeal shall be in the form of a brief, filed within twenty-one (21) days after service of the initial decision, and shall comply with §3.52(b) in all other respects.

(6) Within fourteen (14) days after service of the appeal brief, the appellee may file an answering brief which shall comply with §3.52(c). Cross-appeals, as permitted in §3.52(c), may not be raised in an appellee's answering brief. All issues raised on appeal must be presented in the party's appeal brief and must be filed within the deadline specified in paragraphs (c)(4) and (c)(5) of this section.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(7) Within five (5) days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with §3.52(d) in all other respects.

(d) *Discovery*. Discovery shall be governed by subpart D of this part. The ALJ may establish limitations on the number of depositions, witnesses, or any document production, pursuant to his plenary authority under §3.42(c)(6).

### **§3.12 Answer.**

(a) *Time for filing*. A respondent shall file an answer within twenty (20) days after being served with the complaint: *Provided, however*, That the filing of a motion for a more definite statement of the charges shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or thirty (30) days after service of the complaint, whichever is later;

(2) If the motion is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

(b) *Content of answer*. An answer shall conform to the following:

(1) *If allegations of complaint are contested*. An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted*. If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the

### PART 3 – ADJUDICATIVE PROCEEDINGS

material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings and conclusions under §3.46 and the right to appeal the initial decision to the Commission under §3.52.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

#### **§3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.**

(a) *Notice of hearing.* When the Commission, acting under §1.26(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before an Administrative Law Judge for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the *Federal Register* containing a statement of:

- (1) The provisions of the rule or order to which objections have been filed;
- (2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a rule or order, and any person who files objections sufficient to warrant the holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the Administrative Law Judge and a showing of good cause, any interested person may be designated by the Administrative Law Judge as a party.

### **§3.14 Intervention.**

(a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of §4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

(b) In an adjudicative proceeding where the complaint states that divestiture relief is contemplated, the labor organization[s] representing employees of the respondent[s] may intervene as a matter of right. Applications for such intervention are to be made in accordance with the procedures set forth in paragraph (a) of this section and must be filed within 60 days of the issuance of the complaint. Intervention

### PART 3 – ADJUDICATIVE PROCEEDINGS

as a matter of right shall be limited to the issue of the effect, if any, of proposed remedies on employment, with full rights of participation in the proceeding concerning this issue. This paragraph does not affect a labor organization's ability to petition for leave to intervene pursuant to §3.14(a).

#### **§3.15 Amendments and supplemental pleadings.**

##### *(a) Amendments.*

(1) *By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings.* The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.



ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart C – Prehearing Procedures; Motions;  
Interlocutory Appeals; Summary Decisions**

**§3.21 Prehearing procedures.**

(a) *Meeting of the parties before scheduling conference.* As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to agree, if possible, on a proposed discovery schedule, a preliminary estimate of the time required for the hearing, and a proposed hearing date, and on any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than seven (7) days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) *Prehearing scheduling order.*

(1) Not later than two (2) days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference and of the evidentiary hearing.

(2) The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the

### PART 3 – ADJUDICATIVE PROCEEDINGS

proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the orderly and expeditious disposition of a proceeding. Such conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* Prehearing conferences shall be public unless the Administrative Law Judge determines in his or her discretion that the conference (or any part thereof) shall be closed to the public. The Administrative Law Judge shall have discretion to determine whether a prehearing conference shall be stenographically reported.

#### **§3.22 Motions.**

(a) *Presentation and disposition.* During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under §3.26, §3.42(g), or §4.17, shall be addressed to and ruled

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

upon, if within his or her authority, by the Administrative Law Judge. The Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments. The Commission may order the ALJ to submit a recommendation or an amplification thereof. Rulings or recommendations containing information granted *in camera* status pursuant to §3.45 shall be filed in accordance with §3.45(f). All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(b) *Content.* All written motions shall state the particular order, ruling, or action desired and the grounds therefor. If a party includes in a motion information that has been granted *in camera* status pursuant to §3.45(b), the party shall file two versions of the motion in accordance with the procedures set forth in §3.45(e). The time period specified by §3.22(c) within which an opposing party may file an answer will begin to run upon service on that opposing party of the *in camera* version of a motion.

(c) *Answers.* Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to §3.45(b), the opposing party shall file two versions of the answer in accordance with the procedures set forth in §3.45(e). The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions

### PART 3 – ADJUDICATIVE PROCEEDINGS

for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(e) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provisions of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record, in accordance with the procedures set forth in paragraph (a) of this section, and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge may defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

(f) *Statement.* Each motion to quash filed pursuant to §3.34(c), each motion to compel or determine sufficiency pursuant to §3.38(a), each motion for sanctions pursuant to §3.38(b), and each motion for enforcement pursuant to §3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§3.23 Interlocutory appeals.**

(a) *Appeals without a determination by the Administrative Law Judge.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(1) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to §3.36, if such appeal is based solely on a claim of privilege: *provided*, that The Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of nonpublic Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, individual Commissioner, or the Office of the General Counsel;

(2) Suspends an attorney from participation in a particular proceeding pursuant to §3.42(d); or

(3) Grants or denies an application for intervention pursuant to the provisions of §3.14.

Appeal from such rulings may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party relies; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the Administrative Law Judge pursuant to §3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered

### PART 3 – ADJUDICATIVE PROCEEDINGS

and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the Administrative Law Judge.* Except as provided in paragraph (a) of this section, applications for review of a ruling by the Administrative Law Judge may be allowed only upon request made to the Administrative Law Judge and a determination by the Administrative Law Judge in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Applications for review in writing may be filed, not to exceed fifteen (15) pages exclusive of those attachments required below, within five (5) days after notice of the Administrative Law Judge's determination. Additionally, the moving party is required to attach the ruling or part thereof from which appeal is being taken and any other portions of the record on which the moving party is relying. Answer thereto may be filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

#### **§3.24 Summary decisions.**

(a) *Procedure.*

(1) Any party to an adjudicatory proceeding may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is not

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

genuine issue. Counsel in support of the complaint may so move at any time after twenty (20) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to §3.21, but in any case at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) Any other party may, within ten (10) days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in §3.24(a)(3). The Administrative Law Judge may, in his discretion, set the matter for oral argument and call for the submission of briefs or memoranda. If a party includes in any such brief or memorandum information that has been granted *in camera* status pursuant to §3.45(b), the party shall file two versions of the document in accordance with the procedures set forth in §3.45(e). The decision sought by the moving party shall be rendered within thirty (30) days if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law. Any such decision shall constitute the initial decision of the Administrative Law Judge and shall accord with the procedures set forth in §3.51(c). A summary decision, interlocutory in character and in compliance with the procedures set forth in §3.51(c), may be rendered on the issue of liability alone although there is a genuine issue as to the nature and extent of relief.

(3) Affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The Administrative Law Judge may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary decision is made and supported as provided in this rule, a party opposing the motion may not rest upon the mere allegations or

### PART 3 – ADJUDICATIVE PROCEEDINGS

denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial. If no such response is filed, summary decision, if appropriate, shall be rendered.

(4) Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the Administrative Law Judge may refuse the application for summary decision or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is appropriate and a determination to that effect shall be made a matter of record.

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Administrative Law Judge shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

*(b) Affidavits filed in bad faith.*

(1) Should it appear to the satisfaction of the Administrative Law Judge at any time that any of the affidavits presented pursuant to this rule are presented in bad faith, or solely for the purpose of delay, or are patently frivolous, the Administrative Law Judge shall enter a determination to that effect upon the record.

(2) If upon consideration of all relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, the Administrative Law Judge concludes that action by him to suspend or remove an attorney from the case is warranted, he shall take action as specified in §3.42(d). If the Administrative Law Judge concludes, upon consideration of all the relevant facts attending the submission of any affidavit covered by paragraph (b)(1) of this section, that the matter should be certified to the Commission for consideration of disciplinary action against an attorney, including reprimand, suspension or disbarment, the examiner shall certify the



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

matter, with his findings and recommendations, to the Commission for its consideration of disciplinary action in the manner provided by the Commission's rules.

### **§3.25 Consent agreement settlements.**

(a) The Administrative Law Judge may, in his discretion and without suspension of prehearing procedures, hold conferences for the purpose of supervising negotiations for the settlement of the case, in whole or in part, by way of consent agreement.

(b) A proposal to settle a matter in adjudication by consent agreement shall be submitted by way of a motion to withdraw the matter from adjudication for the purpose of considering the proposed consent agreement. Such motion shall be filed with the Secretary of the Commission, as provided in §4.2. Any such motion shall be accompanied by a proposed consent agreement containing a proposed order executed by one or more respondents and conforming to the requirements of §2.32; the proposed consent agreement itself, however, shall not be placed on the public record unless and until it is accepted by the Commission as provided herein. If the proposed consent agreement affects only some of the respondents or resolves only some of the charges in adjudication, the motion required by this subsection shall so state and shall specify the portions of the matter that the proposal would resolve.

(c) If the proposed consent agreement accompanying the motion has also been executed by complaint counsel, including the appropriate Bureau Director, the Secretary shall issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve and all proceedings before the Administrative Law Judge shall be stayed with respect to such portions, pending a determination by the Commission pursuant to paragraph (f) of this section.

(d) If the proposed consent agreement accompanying the motion has not been executed by complaint counsel, the Administrative Law Judge may certify the motion and agreement to the Commission

### PART 3 – ADJUDICATIVE PROCEEDINGS

together with his recommendation if he determines, in writing, that there is a likelihood of settlement. The filing of a motion under this subsection and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. Upon certification of a motion pursuant to this subsection, the Commission may, if it is satisfied that there is a likelihood of settlement, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve, for the purpose of considering the proposed consent agreement.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraph (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After the matter has been withdrawn from adjudication, in whole or in part, the Commission may:

- (1) Accept the proposed consent agreement,
- (2) Reject it and return to adjudication for further proceedings any portion of the matter previously withdrawn from adjudication, or
- (3) Take such other action as it may deem appropriate.

If a proposed consent agreement is accepted, the Commission will place it on the public record, together with any initial report of compliance submitted pursuant to §2.33, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby, and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the explanation in the *Federal Register*. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments concerning the order that may be filed by any interested person. Thereafter, the Commission may either withdraw its acceptance of the agreement and so notify the parties, in which event it will return the affected portions of the matter to adjudication for further proceedings or take such

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

other action as it may consider appropriate, or issue and serve its decision.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

### **§3.26 Motions following denial of preliminary injunctive relief.**

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought, under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. Such a motion must be filed within fourteen (14) days after:

(1) A district court has denied preliminary injunctive relief, all opportunity has passed for the Commission to seek reconsideration of the denial or to appeal it, and the Commission has neither sought reconsideration of the denial nor appealed it; or

(2) A court of appeals has denied preliminary injunctive relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed by all of the respondents in the adjudicative proceeding. The Secretary shall issue an order withdrawing the matter from adjudication two days after such a motion is filed, except that, if complaint counsel have objected that the conditions of paragraph (b) of this section have not been met, the Commission shall determine whether to withdraw the matter from adjudication.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(d) *Consideration on the record.*

(1) In lieu of a motion to withdraw a matter from adjudication under paragraph (c) of this section, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Motions filed under this paragraph shall incorporate or be accompanied by a supporting brief or memorandum.

(2) *Stay.* A motion under this paragraph will stay all proceedings before the Administrative Law Judge until such time as the Commission directs otherwise.

(3) *Answer.* Within fourteen (14) days after service of a motion filed under this paragraph, complaint counsel may file an answer.

(4) *Form.* Motions (including any supporting briefs and memoranda) and answers under this paragraph shall not exceed 30 pages if printed, or 45 pages if typewritten, and shall comply with the requirements of §3.52(e).

(5) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *in camera* materials for purposes of this paragraph and the party shall file two versions of the document in accordance with the procedures set forth in §3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart D – Discovery; Compulsory Process**

**§3.31 General provisions.**

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) *Initial disclosures.* Complaint counsel and respondent's counsel shall, within five (5) days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in §3.31(c)(1);

(2) A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in §3.31(c)(1); unless such information or materials are privileged as defined in §3.31(c)(2), pertain to hearing preparation as defined in §3.31(c)(3), pertain to experts as defined in §3.31(c)(4), or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(c) *Scope of discovery.* Unless otherwise limited by order of the Administrative Law Judge or the Commission in accordance with these rules, the scope of discovery is as follows:

(1) *In general; limitations.* Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he determines that:

(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) The burden and expense of the proposed discovery outweigh its likely benefit.

(2) *Privilege.* The Administrative Law Judge may enter a protective order denying or limiting discovery to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing preparations: Materials.* Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Administrative Law Judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

### (4) *Hearing preparation: Experts.*

(i) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for hearing, may be obtained only as follows:

(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the Administrative Law Judge may order further discovery by other means, subject to such restrictions as to scope as the Administrative Law Judge may deem appropriate.

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Administrative Law Judge may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 unless the parties have stipulated a higher amount, for time spent in

### PART 3 – ADJUDICATIVE PROCEEDINGS

responding to discovery under paragraphs (c)(4)(i)(B) and (c)(4)(ii) of this section.

(d) *Protective orders; order to preserve evidence.*

(1) The Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(2) [Reserved]

(e) *Supplementation of disclosures and responses.* A party who has made an initial disclosure under §3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its initial disclosures under §3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

(f) *Stipulations.* When approved by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery.



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(g) *Ex parte rulings on applications for compulsory process.* Applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to §3.34 may be made *ex parte*, and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission.

### **§3.32 Admissions.**

(a) At any time after thirty (30) days after issuance of compliant or after publication of notice of an adjudicative hearing in a rulemaking proceeding under §3.13, any party may serve on any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or are known to be, and in the request are stated as being, in the possession of the other party. Each matter of which an admission is requested shall be separately set forth. A copy of the request shall be filed with the Secretary.

(b) The matter is admitted unless, within ten (10) days after service of the request, or within such shorter or longer time as the Administrative Law Judge may allow, the party to whom the request is directed serves upon the party requesting the admission, with a copy filed with the Secretary, a sworn written answer or objection addressed to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or

### PART 3 – ADJUDICATIVE PROCEEDINGS

deny unless the party states that it has made reasonable inquiry and that the information known to or readily obtainable by the party is insufficient to enable it to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may deny the matter or set forth reasons why the party cannot admit or deny it.

(c) Any matter admitted under this rule is conclusively established unless the Administrative Law Judge on motion permits withdrawal or amendment of the admission. The Administrative Law Judge may permit withdrawal or amendment when the presentation of the merits of the proceeding will be subserved thereby and the party who obtained the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

#### **§3.33 Depositions.**

(a) *In general.* Any party may take a deposition of a named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under §3.31(c)(1). Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them.

(b) [Reserved]

(c) *Notice to corporation or other organization.* A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office to the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

(d) *Taking of deposition.* Each deponent shall be duly sworn, and any party shall have the right to question him. Objections to questions or to evidence presented shall be in short form, stating the grounds of objections relied upon. The questions propounded and the answers thereto, together with all objections made, shall be recorded and certified by the officer. Thereafter, upon payment of the charges therefor, the officer shall furnish a copy of the deposition to the deponent and to any party.

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

- (1) The name and address of the person who is to answer them, and
- (2) The name or descriptive title and address of the officer before whom the deposition is to be taken.

### PART 3 – ADJUDICATIVE PROCEEDINGS

A deposition upon written questions may be taken of a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office of the Federal Trade Commission in accordance with the provisions of Rule 3.33(c). Within 30 days after the notice and written questions are served, any other party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, the party taking the deposition may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, any other party may serve recross questions upon all other parties. The content of any question shall not be disclosed to the deponent prior to the taking of the deposition. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly to take the testimony of the deponent in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(f) *Correction of deposition.* A deposition may be corrected, as to form or substance, in the manner provided by §3.44(b). Any such deposition shall, in addition to the other required procedures, be read to or by the deponent and signed by him, unless the parties by stipulation waive the signing or the deponent is unavailable or cannot be found or refuses to sign. If the deposition is not signed by the deponent within 30 days of its submission or attempted submission, the officer shall sign it and certify that the signing has been waived or that the deponent is unavailable or that the deponent has refused to sign, as the case may be, together with the reason for the refusal to sign, if any has been given. The deposition may then be used as though signed unless, on a motion to suppress under Rule 3.33(g)(3)(iv), the Administrative Law Judge determines that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. In addition to and not in lieu of the procedure for formal correction of

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

the deposition, the deponent may enter in the record at the time of signing a list of objections to the transcription of his remarks, stating with specificity the alleged errors in the transcript.

(g)(1) *Use of depositions in hearings.* At the hearing on the complaint or upon a motion, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(i) Any deposition may be used for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(ii) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of a public or private corporation, partnership or association which is a party, or of an official or employee (other than a special employee) of the Commission, may be used by an adverse party for any purpose.

(iii) A deposition may be used by any party for any purpose if the Administrative Law Judge finds:

(A) That the deponent is dead; or

(B) That the deponent is out of the United States or is located at such a distance that his attendance would be impractical, unless it appears that the absence of the deponent was procured by the party offering the deposition; or

(C) That the deponent is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(D) That the party offering the deposition has been unable to procure the attendance of the deponent by subpoena; or

(E) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(iv) If only part of a deposition is offered in evidence by a party, any other party may introduce any other part which ought in fairness to be considered with the part introduced.

(2) *Objections to admissibility.* Subject to the provisions of paragraph (g)(3) of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(3) *Effect of errors and irregularities in depositions.*

(i) *As to notice.* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(ii) *As to disqualification of officer.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(iii) *As to taking of deposition.*

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions are waived unless served in writing upon all parties within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(iv) *As to completion and return of deposition.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or with due diligence might have been ascertained.

### **§3.34 Subpoenas.**

(a) *Subpoenas ad testificandum.*

(1) *Prehearing.* The Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service.

(2) *Hearing.* Application for issuance of a subpoena commanding a person to attend and give testimony at an adjudicative hearing shall be made in writing to the Administrative Law Judge. Such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* The Secretary of the Commission, upon request of a party, shall issue a subpoena, signed but otherwise in blank, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term *documents* includes writings, drawings, graphs, charts, handwritten notes, film, photographs, audio and video recordings and any such representations stored on a computer, a computer disk, CD-ROM, magnetic or electronic tape, or any other means of electronic storage, and other data compilations from which information can be obtained in

### PART 3 – ADJUDICATIVE PROCEEDINGS

machine-readable form (translated, if necessary, into reasonably usable form by the person subject to the subpoena). A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas to other government agencies.* Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed within the earlier of ten (10) days after service thereof or the time for compliance therewith. Such motions shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate arguments, affidavits and other supporting documentation, and shall include the statement required by Rule 3.22(f). Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas requiring the appearance of, or the production of documents in the possession, custody, or control of, an official or employee of a governmental agency other than the Commission, which may be authorized only in accordance with §3.36.

#### **§3.35 Interrogatories to parties.**

(a) *Availability; procedures for use.*

(1) Any party may serve upon any other party written interrogatories, not exceeding twenty-five (25) in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. For this purpose, information shall not be deemed to be available insofar as it is in the possession of the Commissioners, the General Counsel, the office of Administrative Law Judges, or the Secretary in his capacity as custodian or recorder of any such information, or their respective staffs.

(2) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to on grounds not raised and



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

ruled on in connection with the authorization, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within thirty (30) days after the service of the interrogatories. The Administrative Law Judge may allow a shorter or longer time.

(b) *Scope; use at hearing.*

(1) Interrogatories may relate to any matters that can be inquired into under §3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

(2) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Administrative Law Judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

(c) *Option to produce records.* Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. The specification shall include sufficient detail to permit the interrogating party to identify readily the individual documents from which the answer may be ascertained.

## PART 3 – ADJUDICATIVE PROCEEDINGS

### **§3.36 Applications for subpoenas for records, or appearances by officials or employees, of governmental agencies other than the Commission.**

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in §3.34(b), or for the issuance of a subpoena requiring access to documents or other tangible things, for the purposes described in §3.37(a), in the possession, custody, or control of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of an official or employee of another governmental agency, shall be made in the form of a written motion filed in accordance with the provisions of §3.22(a). No application for records pursuant to §4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall satisfy the same requirements for a subpoena under §3.34 or a request for production or access under §3.37, together with a specific showing that:

- (1) The material sought is reasonable in scope;
- (2) If for purposes of discovery, the material falls within the limits of discovery under §3.31(b)(1), or, if for an adjudicative hearing, the material is reasonably relevant; and
- (3) The information or material sought cannot reasonably be obtained by other means.

### **§3.37 Production of documents and things; access for inspection and other purposes.**

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents, as defined in §3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of §3.31(c)(1) and in the possession, custody or control of the party upon whom the request is served; or to permit entry upon designated

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of §3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in §3.34.

(b) *Response; objections.* The response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under §3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

### **§3.38 Motion for order compelling disclosure or discovery; sanctions.**

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the initial disclosures required by §3.31(b), a request for admission under §3.32, a deposition under §3.33, or an interrogatory under §3.35.

(1) *Initial disclosures; requests for admission; depositions; interrogatories.* Unless the objecting party sustains its burden of

### PART 3 – ADJUDICATIVE PROCEEDINGS

showing that the objection is justified, the Administrative Law Judge shall order that an answer be served or disclosure otherwise be made. If the Administrative Law Judge determines that an answer or other response by the objecting party does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer or response be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(2) *Requests for production or access.* If a party fails to respond to or comply as requested with a request for production or access made under §3.37(a), the discovering party may move for an order to compel production or access in accordance with the request.

(b) If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

(c) Any such action may be taken by written or oral order issued in the course of the proceeding or by inclusion in an initial decision of the Administrative Law Judge or an order or opinion of the Commission. It shall be the duty of parties to seek and Administrative Law Judges to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for withheld testimony, documents, or other evidence. If in the Administrative Law Judge's opinion such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order, he shall certify to the Commission a request that court enforcement of the subpoena or order be sought.

### **§3.38A Withholding requested material.**

(a) Any person withholding material responsive to a subpoena issued pursuant to §3.34, written interrogatories requested pursuant to §3.35, a request for production or access pursuant to §3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material. Such person shall, if so directed in the subpoena or other request for production, submit, together with such claim, a schedule of the items withheld which states individually as to each such item the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged.

(b) A person withholding material for reasons described in §3.38A(a) shall comply with the requirements of that subsection in lieu of filing a motion to limit or quash compulsory process.

PART 3 – ADJUDICATIVE PROCEEDINGS

**§3.39 Orders requiring witnesses to testify or provide other information and granting immunity.**

(a) Where Commission complaint counsel desire the issuance of an order requiring a witness or deponent to testify or provide other information and granting immunity under title 18, section 6002, United States Code, Directors and Assistant Directors of Bureaus and Regional Directors and Assistant Regional Directors of Commission Regional Offices having responsibility for presenting evidence in support of the complaint are authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of such an order. Upon receipt of approval by the Attorney General (or his designee), the Administrative Law Judge is authorized to issue an order requiring the witness or deponent to testify or provide other information and granting immunity when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

(b) Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under title 18, section 6002, United States Code, may be made to the Administrative Law Judge and may be made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his privilege against self-incrimination; and, upon making such determinations, to request,

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his designee) has granted such approval, to issue such order when the witness or deponent has invoked his privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

### **§3.40 Admissibility of evidence in advertising substantiation cases.**

(a) If a person, partnership, or corporation is required through compulsory process under section 6, 9 or 20 of the Act issued after October 26, 1977 to submit to the Commission substantiation in support of an express or an implied representation contained in an advertisement, such person, partnership or corporation shall not thereafter be allowed, in any adjudicative proceeding in which it is alleged that the person, partnership, or corporation lacked a reasonable basis for the representation, and for any purpose relating to the defense of such allegation, to introduce into the record, whether directly or indirectly through references contained in documents or oral testimony, any material of any type whatsoever that was required to be but was not timely submitted in response to said compulsory process. *Provided, however,* that a person, partnership, or corporation is not, within the meaning of this section, required through compulsory process to submit substantiation with respect to those portions of said compulsory process to which such person, partnership, or corporation has raised good faith legal objections in a timely motion pursuant to the Commission's Rules of Practice and Procedure, until the Commission denies such motion; or if the person, partnership, or corporation thereafter continues to refuse to comply, until such process has been judicially enforced.

(b) The Administrative Law Judge shall, upon motion, at any stage exclude all material that was required to be but was not timely submitted in response to compulsory process described in para-

### PART 3 – ADJUDICATIVE PROCEEDINGS

graph (a) of this section, or any reference to such material, unless the person, partnership, or corporation demonstrates in a hearing, and the Administrative Law Judge finds, that by the exercise of due diligence the material could not have been timely submitted in response to the compulsory process, and that the Commission was notified of the existence of the material immediately upon its discovery. Said findings of the Administrative Law Judge shall be in writing and shall specify with particularity the evidence relied upon. The rules normally governing the admissibility of evidence in Commission proceedings shall in any event apply to any material coming within the above exception.



ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart E – Hearings**

**§3.41 General rules.**

(a) *Public hearings.* All hearings in adjudicative proceedings shall be public unless an *in camera* order is entered by the Administrative Law Judge pursuant to §3.45(b) of this chapter or unless otherwise ordered by the Commission.

(b) *Expedition.* Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue, except for brief intervals of the sort normally involved in judicial proceedings, without suspension until concluded. Consistent with the requirements of expedition:

(1) The Administrative Law Judge may order hearings at more than one place and may grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the pre-hearing procedure where the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.

(2) When actions involving a common question of law or fact are pending before the Administrative Law Judge, the Administrative Law Judge may order a joint hearing of any or all the matters in issue in the actions; the Administrative Law Judge may order all the actions consolidated; and the Administrative Law Judge may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(3) When separate hearings will be conducive to expedition and economy, the Administrative Law Judge may order a separate hearing of any claim, or of any separate issue, or of any number of claims or issues.

(c) *Rights of parties.* Every party, except intervenors, whose rights are determined under §3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(d) *Adverse witnesses.* An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him.

(e) *Participation in adjudicative packaging and labeling hearings.* At adjudicative hearings under the Fair Packaging and Labeling Act, any party or any interested person designated as a party pursuant to §3.13, or his representative, may be sworn as a witness and heard.

(f) Requests for an order requiring a witness to testify or provide other information and granting immunity under title 18, section 6002, of the United States Code, shall be disposed of in accordance with §3.39.

#### **§3.42 Presiding officials.**

(a) *Who presides.* Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges; and the term *Administrative Law Judge* as used in this part means and applies to the Commission or any of its members when so sitting.

(b) *How assigned.* The presiding Administrative Law Judge shall be designated by the Chief Administrative Law Judge or, when the Commission or one or more of its members preside, by the Commission, who shall notify the parties of the Administrative Law Judge designated.

(c) *Powers and duties.* Administrative Law Judges shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas and orders requiring answers to questions;
- (3) To take depositions or to cause depositions to be taken;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(4) To compel admissions, upon request of a party or on their own initiative;

(5) To rule upon offers of proof and receive evidence;

(6) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose;

(8) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;

(9) To make and file initial decisions;

(10) To certify questions to the Commission for its determination; and

(11) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, U.S.C.

(d) *Suspension of attorneys by Administrative Law Judge.* The Administrative Law Judge shall have the authority, for good cause stated on the record, to suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding. Any attorney so suspended or barred may appeal to the Commission in accordance with the provisions of §3.23(a). The appeal shall not operate to suspend the hearing unless otherwise ordered by the Administrative Law Judge or the Commission; in the event the hearing is not suspended, the attorney may continue to participate therein pending disposition of the appeal.

(e) *Substitution of Administrative Law Judge.* In the event of the substitution of a new Administrative Law Judge for the one originally designated, any motion predicated upon such substitution shall be made within five (5) days thereafter.

(f) *Interference.* In the performance of their adjudicative functions, Administrative Law Judges shall not be responsible to or subject to

### PART 3 – ADJUDICATIVE PROCEEDINGS

the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission, and all direction by the Commission to Administrative Law Judges concerning any adjudicative proceedings shall appear in and be made a part of the record.

(g) *Disqualification of Administrative Law Judges.*

(1) When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal.

(2) Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary a motion addressed to the Administrative Law Judge to disqualify and remove him, such motion to be supported by affidavits setting forth the alleged grounds for disqualification. If the Administrative Law Judge does not disqualify himself within ten (10) days, he shall certify the motion to the Commission, together with any statement he may wish to have considered by the Commission. The Commission shall promptly determine the validity of the grounds alleged, either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose.

(3) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(h) *Failure to comply with Administrative Law Judge's directions.*

Any party who refuses or fails to comply with a lawfully issued order or direction of an Administrative Law Judge may be considered to be in contempt of the Commission. The circumstances of any such neglect, refusal, or failure, together with a recommendation for appropriate action, shall be promptly certified by the Administrative Law Judge to the Commission. The Commission may make such orders in regard thereto as the circumstances may warrant.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**§3.43 Evidence.**

(a) *Burden of proof.* Counsel representing the Commission, or any person who has filed objections sufficient to warrant the holding of an adjudicative hearing pursuant to §3.13, shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.

(b) *Admissibility; exclusion of relevant evidence; mode and order of interrogation and presentation.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(c) *Information obtained in investigations.* Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

(d) *Official notice.* When any decision of an Administrative Law Judge or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

(e) *Objections.* Objections to evidence shall timely and briefly state the grounds relied upon, but the transcript shall not include argument

### PART 3 – ADJUDICATIVE PROCEEDINGS

or debate thereon except as ordered by the Administrative Law Judge. Rulings on all objections shall appear in the record.

(f) *Exceptions.* Formal exception to an adverse ruling is not required.

(g) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the questioner may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive and report the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

#### **§3.44 Record.**

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed by the official reporter of the Commission under the supervision of the Administrative Law Judge, and the original transcript shall be a part of the record and the sole official transcript. Copies of transcripts are available from the reporter at rates not to exceed the maximum rates fixed by contract between the Commission and the reporter.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the Administrative Law Judge or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the Administrative Law Judge, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the Administrative Law Judge. Corrections shall not be ordered by the Administrative Law Judge except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Commission.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(c) *Closing of the hearing record.* Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the description to permit or order correction of the record as provided in §3.44(b).

### **§3.45 *In camera* orders.**

(a) *Definition.* Except as hereinafter provided, material made subject to an *in camera* order will be kept confidential and not placed on the public record of the proceeding in which it was submitted. Only respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review may have access thereto, provided that the Administrative Law Judge, the Commission and reviewing courts may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding.

(b) *In camera treatment of material.* The Administrative Law Judge may order material, or portions thereof, offered into evidence, whether admitted or rejected, to be placed *in camera* on a finding that their public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting their *in camera* treatment. This finding shall be based on the standard articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961); *see also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), which established a three-part test that was modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). No material, or portion thereof offered into evidence, whether admitted or rejected, may be withheld from the public record unless it falls within the scope of an order issued in accordance with this section, stating the date on which *in camera* treatment will expire, and including:

- (1) A description of the material;
  - (2) A statement of the reasons for granting *in camera* treatment;
- and
- (3) A statement of the reasons for the date on which *in camera* treatment will expire. Such expiration date may not be omitted except

### PART 3 – ADJUDICATIVE PROCEEDINGS

in unusual circumstances, in which event the order shall state with specificity the reasons why the need for confidentiality of the material, or portion thereof at issue is not likely to decrease over time, and any other reasons why such material is entitled to *in camera* treatment for an indeterminate period. Any party desiring, in connection with the preparation and presentation of the case, to disclose *in camera* material to experts, consultants, prospective witnesses, or witnesses, shall make application to the Administrative Law Judge setting forth the justification therefor. The Administrative Law Judge, in granting such application for good cause found, shall enter an order protecting the rights of the affected parties and preventing unnecessary disclosure of information. Material subject to an *in camera* order shall be segregated from the public record and filed in a sealed envelope, or other appropriate container, bearing the title, the docket number of the proceeding, the notation “*In Camera* Record under §3.45,” and the date, if any, on which *in camera* treatment expires.

(c) *Release of in camera material.* *In camera* material constitutes part of the confidential records of the Commission and is subject to the provisions of §4.11 of this chapter.

(d) *Briefs and other submissions referring to in camera information.* Parties shall not disclose information that has been granted *in camera* status pursuant to §3.45(b) in the public version of proposed findings, briefs, or other documents. This provision does not preclude references in such proposed findings, briefs, or other documents to *in camera* information or general statements based on the content of such information.

(e) *When in camera information is included in briefs and other submissions.* If a party includes specific information that has been granted *in camera* status pursuant to §3.45(b) in any document filed in a proceeding under this part, the party shall file two versions of the document. A complete version shall be marked “*In Camera*” on the first page and shall be filed with the Secretary and served upon the parties in accordance with the rules in this part. Any time period within which these rules allow a party to respond to a document shall run from the date the party is served with the complete version of the



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

document. An expurgated version of the document, marked “Public Record” on the first page and omitting the *in camera* information that appears in the complete version, shall be filed with the Secretary within five days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise, and shall be served upon the parties. The expurgated version shall indicate any omissions with brackets or ellipses.

(f) *When in camera information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to §3.45(b), the Administrative Law Judge shall file two versions of the ruling or recommendation. A complete version shall be marked “*In Camera*” on the first page and shall be served upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version, to be filed within five (5) days after the filing of the complete version, shall omit the *in camera* information that appears in the complete version, shall be marked “Public Record” on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

### **§3.46 Proposed findings, conclusions, and order.**

(a) *General.* Upon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on. If a party includes in the proposals information that has been granted *in camera* status pursuant to §3.45(b), the party shall file two versions of the proposals in accordance with the procedures set forth in §3.45(e).

### PART 3 – ADJUDICATIVE PROCEEDINGS

(b) *Exhibit index*. The first statement of proposed findings of fact and conclusions of law filed by a party shall include an index listing for each exhibit offered by the party and received in evidence:

- (1) The exhibit number, followed by
- (2) The exhibit's title or a brief description if the exhibit is untitled;
- (3) The transcript page at which the Administrative Law Judge ruled on the exhibit's admissibility or a citation to any written order in which such ruling was made;
- (4) The transcript pages at which the exhibit is discussed;
- (5) An identification of any other exhibit which summarizes the contents of the listed exhibit, or of any other exhibit of which the listed exhibit is a summary;
- (6) A cross-reference, by exhibit number, to any other portions of that document admitted as a separate exhibit on motion by any other party; and
- (7) A statement whether the exhibit has been accorded *in camera* treatment.

(c) *Witness index*. The first statement of proposed findings of fact and conclusions of law filed by a party shall also include an index to the witnesses called by that party, to include for each witness:

- (1) The name of the witness;
- (2) A brief identification of the witness;
- (3) The transcript pages at which any testimony of the witness appears; and
- (4) A statement identifying any portion of the witness' testimony that was received *in camera*.

(d) *Stipulated indices*. As an alternative to the filing of separate indices, the parties are encouraged to stipulate to joint exhibit and witness indices at the time the first statement of proposed findings of fact and conclusions of law is due to be filed.

(e) *Rulings*. The record shall show the Administrative Law Judge's ruling on each proposed finding and conclusion, except when the order disposing of the proceeding otherwise informs the parties of the action taken.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart F – Decision**

**§3.51 Initial decision.**

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within ninety (90) days after closing the hearing record pursuant to §3.44(c), or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge. In no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days. Such extension, upon its expiration, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. The pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision. The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding. Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the

### PART 3 – ADJUDICATIVE PROCEEDINGS

initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content.*

(1) The initial decision shall include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to §3.45 shall be filed in accordance with §3.45(f).

(2) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(3) An initial decision shall be based upon a consideration of the whole record relevant to the issues decided pursuant to paragraph (c)(1) of this section, and it shall be supported by reliable, probative and substantial evidence.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge; termination of jurisdiction.*

(1) At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### **§3.52 Appeal from initial decision.**

(a) *Who may file; notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission by filing a notice of appeal with the Secretary within 10 days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within 5 days after service of the first notice, or within 10 days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* The appeal shall be in the form of a brief, filed within 30 days after service of the initial decision, and shall contain, in the order indicated, the following:

(1) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(2) A concise statement of the case;

(3) A specification of the questions intended to be urged;

(4) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(5) A proposed form of order for the Commission's consideration instead of the order contained in the initial decision.

The brief shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten, including any appendices but exclusive of pages containing the table of contents, tables of authorities and any addendum containing statutes, rules and regulations.

(c) *Answering brief.* Within 30 days after service of the appeal brief, the appellee may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the

### PART 3 – ADJUDICATIVE PROCEEDINGS

appellant's appeal brief. However, if the appellee is also cross-appealing, its answering brief shall also contain its arguments as to any issues the party is raising on cross-appeal, including the points of fact and law relied upon in support of its position on each question, with specific page references to the record and legal or other material on which the party relies in support of its cross-appeal, and a proposed form of order for the Commission's consideration instead of the order contained in the initial decision. If the appellee does not cross-appeal, its answering brief shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 105 pages, if printed, or 160 pages, if typewritten. The page limitations of this paragraph include any appendices but are exclusive of pages containing the table of contents, tables of authorities, and any addendum containing statutes, rules and regulations.

(d) *Reply brief.* Within 7 days after service of the appellee's answering brief, the appellant may file a reply brief, which shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 60 pages, if printed, or 90 pages, if typewritten. However, if the appellee has cross-appealed, any appellant who is the subject of the cross-appeal may, within 30 days after service of such appellee's brief, file a reply brief, which shall be limited to rebuttal of matters in the appellee's brief and shall not, without leave of the Commission, exceed 75 pages, if printed, or 115 pages, if typewritten. If the appellee has cross-appealed, any party who is the subject of the cross-appeal, other than an appellant may, within 30 days after service of the appellee's brief, file a reply brief which shall be limited to rebuttal of matters raised by the appellee's cross-appeal with respect to the party and shall not, without leave of the Commission, exceed 60 pages if printed, or 90 pages, if typewritten. The appellee who has cross-appealed may, within 7 days after service of a reply to its cross-appeal, file an additional brief, which shall be limited to rebuttal of matters in the reply to its

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

cross-appeal and shall not, without leave of the Commission, exceed 30 pages, if printed, or 45 pages, if typewritten. The page limitations of this paragraph include any appendices but are exclusive of pages containing the table of contents, tables of authorities, and any addendum containing statutes, rules, and regulations. No further briefs may be filed except by leave of the Commission.

(e) *Form of briefs.* Briefs may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. All printed matter must appear in the least 11 point type on opaque, unglazed paper. Briefs produced by the standard typographic process shall be bound in volumes having pages  $6\frac{1}{8}$  by  $9\frac{1}{4}$  inches and type matter  $4\frac{1}{6}$  by  $7\frac{1}{6}$  inches. Those produced by any other process shall be bound in volumes having pages not exceeding  $8\frac{1}{2}$  by 11 inches and type matter not exceeding  $6\frac{1}{2}$  by  $9\frac{1}{2}$  inches, with double spacing between each line of text. Footnotes and quoted material within the text may be single-spaced. Both printed and typewritten briefs shall contain no more than 10 characters (including spaces) per inch.

(f) *In camera information.* If a party includes in any brief to be filed under this section information that has been granted *in camera* status pursuant to §3.45(b), the party shall file two versions of the brief in accordance with the procedures set forth in §3.45(e). The time period specified by this section within which a party may file an answering or reply brief will begin to run upon service on the party of the *in camera* version of a brief.

(g) *Signature.*

(1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it, that to the best of his or her knowledge, information, and belief, the statements made in it are true, and that it

### PART 3 – ADJUDICATIVE PROCEEDINGS

is not interposed for delay. If a brief is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the brief has not been filed.

(h) *Designation of appellant and appellee in cases involving cross-appeals.* In a case involving an appeal by complaint counsel and one or more respondents, any respondent who has filed a timely notice of appeal and as to whom the Administrative Law Judge has issued an order to cease and desist shall be deemed an appellant for purposes of paragraphs (b), (c), and (d) of this section. In a case in which the Administrative Law Judge has dismissed the complaint as to all respondents, complaint counsel shall be deemed the appellant for purposes of paragraphs (b), (c), and (d) of this rule.

(i) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported. The purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored.

(j) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief “Order Correcting Transcript” whenever a joint motion to correct transcript is received.

(k) *Briefs of amicus curiae*. A brief of an *amicus curiae* may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an *amicus curiae* is desirable. Except as otherwise permitted by the Commission, an *amicus curiae* shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons.

**§3.53 Review of initial decision in absence of appeal.** An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

### **§3.54 Decision on appeal or review.**

(a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(b) In rendering its decision, the Commission will adopt, modify, or set aside the findings, conclusions, and rule or order contained in the initial decision, and will include in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions.

(c) In those cases where the Commission believes that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Commission, in its discretion, may withhold final action pending the receipt of such additional information or views.

(d) The order of the Commission disposing of adjudicative hearings under the Fair Packaging and Labeling Act will be published in the *Federal Register* and, if it contains a rule or regulation, will specify the effective date thereof, which will not be prior to the ninetieth (90th) day after its publication unless the Commission finds that emergency conditions exist necessitating an earlier effective date, in which event the Commission will specify in the order its findings as to such conditions.

**§3.55 Reconsideration.** Within fourteen (14) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission. Any party desiring to oppose such a petition shall file an answer thereto within ten (10) days after service upon him of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Commission.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### **§3.56 Effective date of orders; application for stay.**

(a) Other than consent orders, an order to cease and desist under section 5 of the FTC Act becomes effective upon the sixtieth day after service, except as provided in section 5(g)(3) of the FTC Act, and except for divestiture provisions, as provided in section 5(g)(4) of the FTC Act.

(b) Any party subject to a cease and desist order under section 5 of the FTC Act, other than a consent order, may apply to the Commission for a stay of all or part of that order pending judicial review. If, within 30 days after the application was received by the Commission, the Commission either has denied or has not acted on the application, a stay may be sought in a court of appeals where a petition for review of the order is pending.

(c) An application for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The application shall address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) An application for stay shall be filed within 30 days of service of the order on the party. Such application shall be served in accordance with the provisions of §4.4(b) of this part that are applicable to service in adjudicative proceedings. Any party opposing the application may file an answer within 5 business days after receipt of the application. The applicant may file a reply brief, limited to new matters raised by the answer, within 3 business days after receipt of the answer.

### **Subpart G – [Reserved]**

## PART 3 – ADJUDICATIVE PROCEEDINGS

### Subpart H – Reopening of Proceedings

**§3.71 Authority.** Except while pending in a U.S. court of appeals on a petition for review (after the transcript of the record has been filed) or in the U.S. Supreme Court, a proceeding may be reopened by the Commission at any time in accordance with §3.72. Any person subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final may file a request to reopen the proceeding in accordance with §2.51.

#### **§3.72 Reopening.**

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.*

(1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will, except as provided in §2.51, serve upon each person subject to such decision (in the case of proceedings instituted under §3.13, such service may be by publication in the *Federal Register*) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30)

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever an order to show cause is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, if any, or it may serve upon the parties (in the case of proceedings instituted under §3.13, such service may be by publication in *Federal Register*) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by an Administrative Law Judge. Unless otherwise ordered and insofar as practicable, hearings before an Administrative Law Judge to receive evidence shall be conducted in accordance with subparts B, C, D, and E of part 3 of this chapter. Upon conclusion of hearings before an Administrative Law Judge, the record and the Administrative Law Judge's recommendations shall be certified to the Commission for final disposition of the matter.

### (3) *Termination of existing orders.*

(i) *Generally.* Notwithstanding the foregoing provisions of this rule, and except as provided in paragraphs (b)(3) (ii) and (iii) of this section, an order issued by the Commission before August 16, 1995, will be deemed, without further notice or proceedings, to terminate 20 years from the date on which the order was first issued, or on January 2, 1996, whichever is later.

(ii) *Exception.* This paragraph applies to the termination of an order issued before August 16, 1995, where a complaint alleging a violation of the order was or is filed (with or without an accompanying consent decree) in federal court by the United States or the Federal Trade Commission while the order remains in force,

### PART 3 – ADJUDICATIVE PROCEEDINGS

either on or after August 16, 1995, or within the 20 years preceding that date. If more than one complaint was or is filed while the order remains in force, the relevant complaint for purposes of this paragraph will be the latest filed complaint. An order subject to this paragraph will terminate 20 years from the date on which a court complaint described in this paragraph was or is filed, except as provided in the following sentence. If the complaint was or is dismissed, or a federal court rules or has ruled that the respondent did not violate any provision of the order, and the dismissal or ruling was or is not appealed, or was or is upheld on appeal, the order will terminate according to paragraph (b)(3)(i) of this section as though the complaint was never filed; provided, however, that the order will not terminate between the date that such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal. The filing of a complaint described in this paragraph will not affect the duration of any order provision that has expired, or will expire, by its own terms. The filing of a complaint described in this paragraph also will not affect the duration of an order's application to any respondent that is not named in the complaint.

(iii) *Stay of termination.* Any party to an order may seek to stay, in whole or part, the termination of the order as to that party pursuant to paragraph (b)(3) (i) or (ii) of this section. Petitions for such stays shall be filed in accordance with the procedures set forth in §2.51 of these rules. Such petitions shall be filed on or before the date on which the order would be terminated pursuant to paragraph (b)(3) (i) or (ii) of this section. Pending the disposition of such a petition, the order will be deemed to remain in effect without interruption.

(iv) *Orders not terminated.* Nothing in §3.72(b)(3) is intended to apply to *in camera* orders or other procedural or interlocutory rulings by an Administrative Law Judge or the Commission.

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart I– Recovery of Awards Under the Equal Access  
to Justice Act in Commission Proceedings**

**§3.81 General provisions.**

(a) *Purpose of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (called “the Act” in this subpart), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to adjudicative proceedings under part 3 of this title. An eligible party may receive an award when it prevails in the adjudicative proceeding, unless the Commission's position in the proceeding was substantially justified or special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole that is made in the adversary proceeding for which fees and other expenses are sought. The rules in this subpart describe the parties eligible for awards, how to apply for awards, and the procedures and standards that the Commission will use to make them.

(b) *When the Act applies.* The Act applies to any adjudicative proceeding pending before the Commission at any time after October 1, 1981. This includes proceedings begun before October 1, 1981, if final Commission action has not been taken before that date.

(c) *Proceedings covered.*

(1) The Act applies to all adjudicative proceedings under this part 3 of the rules of practice as defined in Rule 3.2, except hearings relating to the promulgation, amendment, or repeal of rules under the Fair Packaging and Labeling Act.

(2) [Reserved]

(d) *Eligibility of applicants.*

(1) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adjudicative proceeding in which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(2) The types of eligible applicants are as follows:

(i) An individual with a net worth of not more than \$2 million;

(ii) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(iii) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(iv) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(v) Any other partnership, corporation, association, unit of local government, or organization with a net worth of not more than \$7 million and not more than 500 employees.

(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(4) An applicant who owns an unincorporated business will be considered as an “individual” rather than a “sole owner of an unincorporated business” if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(5) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the Administrative Law Judge determines that such treatment would be unjust and contrary to the purposes of the Act in



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

light of the actual relationship between the affiliated entities. In addition, the Administrative Law Judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

### (e) *Standards for awards.*

(1) A prevailing applicant may receive an award for fees and expenses incurred in connection with an entire proceeding, or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on complaint counsel, which may avoid an award by showing that its position had a reasonable basis in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

### (f) *Allowable fees and expenses.*

(1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed \$75.00 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission paid expert witnesses for similar services at the time the fees were incurred. The appropriate rate may be obtained from the Office of the Executive Director. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Administrative Law Judge shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

(iii) The time actually spent in the representation of the applicant;

(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(v) Such other factors as may bear on the value of the services provided.

(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

(g) *Rulemaking on maximum rates for attorney fees.* If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), this agency may, upon its own initiative or on petition of any interested person or group, adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this part. Rulemaking under this provision will be in accordance with Rules of Practice part 1, subpart C of this chapter.

#### **§3.82 Information required from applicants.**

(a) *Contents of application.* An application for an award of fees and expenses under the Act shall contain the following:

(1) Identity of the applicant and the proceeding for which the award is sought;

(2) A showing that the applicant has prevailed;

#### ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(3) Identification of the Commission position(s) that applicant alleges was (were) not substantially justified;

(4) A brief description of the type and purpose of the organization or business (unless the applicant is an individual);

(5) A statement of how the applicant meets the criteria of §3.81(d);

(6) The amount of fees and expenses sought;

(7) Any other matters the applicant wishes the Commission to consider in determining whether and in what amount an award should be made;

(8) A written verification under oath or under penalty or perjury that the information provided is true and correct accompanied by the signature of the applicant or an authorized officer or attorney.

(b) *Net worth exhibit.*

(1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the application and any affiliates (as defined in §3.81(d)(6)) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the Administrative Law Judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of the information would adversely affect the applicant, and

### PART 3 – ADJUDICATIVE PROCEEDINGS

why disclosure is not required in the public interest. The material in question shall be served on complaint counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with Rule 4.11.

(c) *Documentation of fees and expenses.* The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(d) *When an application may be filed.*

(1) An application may be filed whenever the applicant has prevailed in the entire proceeding or on a substantive portion of the proceeding that is sufficiently significant and discrete to merit treatment as a separate unit, but in no case later than 30 days after the Commission's final disposition of the proceeding.

(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(3) For purposes of this rule, *final disposition* means the later of:

- (i) The date on which the initial decision of the Administrative Law Judge becomes the decision of the Commission pursuant to §3.51(a);
- (ii) Issuance of an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding;
- (iii) If no petition for reconsideration is filed, the last date on which such petition could have been filed pursuant to §3.55; or
- (iv) Issuance of a final order or any other final resolution of a proceeding, such as a consent agreement, settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

### **§3.83 Procedures for considering applicants.**

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties as specified in §§4.2 and 4.4(b), except as provided in §3.82(b)(2) for confidential financial information.

(b) *Answer to application.*

(1) Within 30 days after service of an application, complaint counsel may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Administrative Law Judge upon request by complaint counsel and the applicant.

(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of complaint counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

### PART 3 – ADJUDICATIVE PROCEEDINGS

(c) *Reply*. Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.

(d) *Comments by other parties*. Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Administrative Law Judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

(e) *Settlement*. The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application. A proposed award settlement entered into in connection with a consent agreement covering the underlying proceeding will be considered in accordance with §3.25. The Commission may request findings of fact or recommendations on the award settlement from the Administrative Law Judge. A proposed award settlement entered into after the underlying proceeding has been concluded will be considered and may be approved or disapproved by the Administrative Law Judge subject to Commission review under paragraph (h) of this section. If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

(f) *Further proceedings*.

(1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Administrative Law Judge may order further proceedings, such as an informal conference, oral argument, additional written submissions or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(2) A request that the Administrative Law Judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

(g) *Decision.* The Administrative Law Judge shall issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(h) *Agency review.* Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with §3.53. If neither the applicant nor complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review.* Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any other party to the proceeding.

## PART 4 – MISCELLANEOUS RULES

### §4.1 Appearances.

#### (a) *Qualifications.*

##### (1) *Attorneys.*

(i) U.S.-admitted. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) European Community (EC)-qualified. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

##### (2) *Others.*

(i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(ii) At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert witness to conduct all or a portion of the cross-examination of such witness.

#### (b) *Restrictions as to former members and employees.*

(1) Except as provided in this section or otherwise specifically authorized by the Commission, no former member or employee of the Commission shall appear as attorney or counsel or otherwise participate through any form of professional consultation or assistance:

(i) In any proceeding or investigation, formal or informal,



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(A) If such proceeding or investigation was itself pending in the Commission while the former member or employee served with the Commission;

(B) If an investigation from which such proceeding or investigation directly resulted was pending during such service; or

(C) If such former member or employee, during the course of his service with the Commission, gained personal knowledge of nonpublic documents or information containing specific criteria for the initiation of future investigations or cases pertaining to a practice involved in the proceeding or investigation, and if the participation by the former member or employee would occur within three (3) years of the termination of his service with the Commission; or

(ii) In an investigation of compliance with an order, submission of a request to reopen an order, or a proceeding with respect to reopening of an order, if the former member or employee participated personally and substantially in the adjudicative proceeding or investigation that resulted in such order.

(2) In cases to which paragraph (b)(1) of this section is applicable, a former member or employee of the Commission may request authorization to appear or participate in a proceeding or investigation by filing with the Secretary of the Commission a written application therefor, disclosing the following information, to the extent known:

(i) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceeding or investigation during his service with the Commission;

(ii) In the case of applications filed pursuant to paragraph (b)(1)(i)(B), (b)(1)(ii), or (b)(1)(iii) of this section, the nature and extent of the former member's or employee's participation in, knowledge of, and connection with the predecessor investigation, adjudication or investigation, or rulemaking proceeding, respectively, during his service with the Commission;

(iii) Whether documents or information concerning the proceeding or investigation came to his attention and, if so, the nature of such documents or information;

#### PART 4 – MISCELLANEOUS RULES

(iv) Whether he was employed in the same bureau, office, division, or other administrative unit in which the proceeding or investigation is or has been pending;

(v) whether he worked directly or in close association with Commission personnel assigned to the proceeding or investigation; and

(vi) Whether during his service with the Commission he was engaged in any matter concerning the individual, company, industry, or any member of the industry involved in the proceeding or investigation.

(3) The requested authorization will not be given in any case:

(i) Where it appears that the former member or employee during his service with the Commission participated personally and substantially in the proceeding or investigation;

(ii) Where the application is filed within two (2) years after termination of the former member's or employee's service with the Commission and it appears that within a period of one (1) year prior to the termination of his service the former member or employee was officially responsible for the proceeding or investigation; or

(iii) Where documents or information of the kind delineated in §4.10(a) pertaining to the proceeding or investigation for which authorization is sought came to the attention of the former member or employee or would be likely to have come to his attention in the course of his duties, unless the Commission finds that the nature of the documents or information is such that no present advantage could thereby be derived.

(4) Notwithstanding any other provision of this section, no former member of the Commission and no former senior employee in a position designated by the Office of Government Ethics pursuant to 18 U.S.C. 207(d) shall, for a period of one (1) year after termination of the former member's or employee's service in that position, appear as attorney or counsel or otherwise represent anyone (other than the United States) in any formal or informal appearance before the Commission in any proceeding or investigation or, with the intent to influence, make any oral or written communication on behalf of

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

anyone in any proceeding or investigation which is before the Commission or in which the Commission has a direct and substantial interest.

(5) The General Counsel shall have the authority (i) to determine whether, under paragraph (b)(1) of this section, a request for authorization to appear or participate need be filed and (ii) to grant any such request. In any case in which the General Counsel proposes that a request be denied, he shall refer the request to the Commission for determination, and in other unusual or difficult cases he may, in his sole discretion, refer a request to the Commission for determination.

(6)(i) The General Counsel shall:

(A) Within three (3) working days of receipt of an oral or written request for a determination whether, under paragraph (b)(1) of this section, a request for authorization to appear or participate need be filed, render such determination and

(B) Within fifteen (15) working days of the receipt of a request for authorization to appear or participate, either grant such request or refer it to the Commission.

(ii) The Commission shall, within fifteen (15) working days of the receipt of a request referred by the General Counsel pursuant to paragraph (b)(5) of this section either grant or deny such request.

(iii)(A) The Commission or the General Counsel may, by written notice to the requester, and for good cause, extend the time limit for a determination by not more than fifteen (15) working days.

(B) Any time limit specified in this paragraph shall be tolled during such time as may elapse between a request by the Commission or General Counsel to the former member or employee for additional information and the receipt of such information by the Commission or General Counsel.

(7)(i) Paragraphs (b)(1), (b)(2), (b)(3) and (b)(4) of this section shall not apply to:

(A) *Pro se* filings of any kind;

(B) Submissions of requests or appeals under the Freedom of Information Act, Privacy Act, or Government in the Sunshine Act;

(C) Testimony under oath;

#### PART 4 – MISCELLANEOUS RULES

(D) Submissions of statements required to be made under penalty of perjury;

(E) Submissions of statements based on the former member's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by §4.5 for witnesses; and

(F) Appearances on behalf of the United States.

(ii) Paragraphs (b)(1), (b)(2), and (b)(3) shall not apply to:

(A) Submissions of comments on a matter on which the Commission has invited public comment; and

(B) Filings of premerger notification forms or participation in subsequent events concerning compliance or noncompliance with section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulations issued pursuant to that section.

(8)(i) In any case in which a former member or employee of the Commission is prohibited under paragraph (b)(3)(i) of this section from appearing or participating in a Commission proceeding or investigation, no partner or legal or business associate of such former member or employee shall appear or participate in such proceeding or investigation, except as provided in this paragraph.

(ii) If a partner or legal or business associate of a former member or employee of the Commission prohibited under paragraph (b)(3)(i) of this section from appearing or participating in a Commission proceeding or investigation wishes to appear or participate in such proceeding or investigation, he shall file with the Secretary of the Commission, not later than the time such appearance or participation begins, an affidavit attesting:

(A) That the former member or employee will not participate in the proceeding or investigation in any way, directly or indirectly; (B) that he will not share, directly or indirectly, in any fees in the proceeding or investigation; (C) that all persons who intend to appear or participate are aware of the requirement that the former member or employee be screened from participating in or discussing the proceeding or investigation, or the firm's representation, and

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

describing the procedures being taken to screen the personally disqualified former member or employee; (D) that the client or clients have been so informed; and (E) that the matter was not brought to such partner or legal or business associate through the active solicitation of the former member or employee.

(iii) Upon the filing of the affidavit, such partner or legal or business associate may begin such appearance or participation, *Provided, however,* That if the Commission finds (A) that the screening measures being taken are unsatisfactory or (B) that the matter was brought to such partner or legal or business associate through the active solicitation of the former member or employee, and so notifies such partner or legal or business associate, such appearance or representation shall cease immediately.

(9)(i) The restrictions and procedures in this subsection are intended to apply in lieu of restrictions and procedures as may be adopted by the appropriate authority in any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations: *Provided, however,* That nothing in this section supersedes other standards of ethical conduct required under paragraph (e) of this section.

(ii) In the event that Commission approval is sought for an appearance or participation by a former member or employee in a proceeding in court or before another agency, the General Counsel shall have the authority to respond to such a request, applying as appropriate the standards of this paragraph (b)(9)(ii).

(c) *Public disclosure.* All applications requesting authorization to appear or participate in a proceeding or investigation, and the Commission's responses thereto, are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter. Information identifying the subject of a nonpublic Commission investigation will be redacted from all applications and responses before they are placed on the public record.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written

#### PART 4 – MISCELLANEOUS RULES

notice of appearance, stating the basis for eligibility under this section and including the attorney's jurisdiction of admission/qualification, attorney identification number, if applicable, and a statement by the appearing attorney attesting to his/her good standing within the legal profession. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

(e) *Standards of conduct; disbarment.*

(1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

#### **§4.2 Requirements as to form, and filing of documents other than correspondence.**

(a) *Filing.*

(1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided, however,* That in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the appropriate Director, Deputy Director, Associate Director in the Bureau of Consumer Protection, or Assistant Director in the Bureau of Competition or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings

#### ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

shall, at or before the time of filing, be served by the party filing the documents or person acting for that party on all other parties pursuant to §4.4.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title*. Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Copies*. An original and twenty (20) copies of all documents before the Commission and motions for an Administrative Law Judge's certification of an interlocutory appeal pursuant to §3.23(b) shall be filed; an original and ten (10) copies of all other documents before the Administrative Law Judge shall be filed; and an original and one (1) copy of compliance reports shall be filed. Only one (1) copy of admissions and answers thereto must be filed with the Secretary, the originals to be served on the opposing party as specified by §3.32. With respect to motions under §3.22, the moving party shall provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(d) *Form*.

(1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by §3.52(e).

(3) If printed, documents shall be on good unglazed paper seven (7) inches by ten (10) inches. The type shall not be less than ten (10) point adequately leaded. Citations and quotations shall not be less than ten (10) point single leaded, and footnotes shall not be less than eight (8) point single leaded. The printed line shall not exceed four and three-quarter (4¾) inches in length.

#### PART 4 – MISCELLANEOUS RULES

(4) If typewritten, documents shall be on paper not less than eight (8) inches nor more than eight and one-half (8½) inches by not less than ten and one-half (10½) inches nor more than eleven (11) inches.

(5) All documents must be bound on the left side. Except for printed documents, the left margin of each page must be at least one and one-half (1½) inches and the right margin at least one (1) inch.

(e) *Signature.*

(1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association. In addition, motions filed pursuant to §3.22 shall include the name, address, and telephone number of counsel.

(2) Signing a document constitutes a representation by the signer that he has read it, that to the best of his knowledge, information, and belief, the statements made in it are true, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

#### **§4.3 Time.**

(a) *Computation.* Computation of any period of time prescribed or allowed by the rules in this chapter, by order of the Commission or an Administrative Law Judge, or by any applicable statute, shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national holiday, or other day on which the office of the Commission is closed, the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, is seven (7) days or less, each of the Saturdays, Sundays, and such holidays shall be



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

excluded from the computation. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, exceeds seven (7) days, each of the Saturdays, Sundays, and such holidays shall be included in the computation.

(b) *Extensions.* For good cause shown, the Administrative Law Judge may, in any proceeding before him, extend any time limit prescribed or allowed by the rules in this chapter or by order of the Commission or the Administrative Law Judge, except those governing the filing of interlocutory appeals and initial decisions and those expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge: *Provided, however;* That in a proceeding pending before an Administrative Law Judge, any motion on which he may properly rule shall be made to him. Notwithstanding the above, where a motion to extend is made after the expiration of the specified period, the Administrative Law Judge or the Commission may consider the motion where the untimely filing was the result of excusable neglect.

(c) *Additional time after service by mail.* Whenever a party in an adjudicative proceeding under part 3 of the rules is required or permitted to do an act within a prescribed period after service of a paper upon it and the paper is served by first-class mail pursuant to §4.4(a)(3) or §4.4(b), 3 days shall be added to the prescribed period.

### **§4.4 Service.**

(a) *By the Commission.*

(1) Service of complaints, initial decisions, final orders and other processes of the Commission under 15 U.S.C. 45 may be effected as follows:

(i) *By registered or certified mail.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed; service under

#### PART 4 – MISCELLANEOUS RULES

this provision is complete upon delivery of the document by the Post Office; or

(ii) *By delivery to an individual.* A copy thereof may be delivered to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation or unincorporated association to be served; service under this provision is complete upon delivery as specified herein; or

(iii) *By delivery to an address.* A copy thereof may be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association, or it may be left at the residence of the person or of a member of the partnership or of an executive officer or director of the corporation, or unincorporated association to be served; service under this provision is complete upon delivery as specified herein.

(2) All other orders and notices, including subpoenas, orders requiring access, orders to file annual and special reports, and notices of default, may be served by any method reasonably certain to inform the affected person, partnership, corporation or unincorporated association, including any method specified in paragraph (a)(1), except that civil investigative demands may only be served in the manner provided by section 20(c)(7) of the FTC Act (in the case of service on a partnership, corporation, association, or other legal entity) or section 20(c)(8) of the FTC Act (in the case of a natural person). Service under this provision is complete upon delivery by the Post Office or upon personal delivery.

(3) All documents served in adjudicative proceedings under part 3 of the Commission's Rules of Practice other than complaints and initial, interlocutory, and final decisions and orders may be served by personal delivery or by first-class mail and shall be deemed served on the day of personal delivery or the day of mailing.

(4) When a party has appeared in a proceeding by an attorney, service on that individual of any document pertaining to the proceeding other than a complaint shall be deemed service upon the party. However, service of those documents specified in paragraph

#### ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(a)(1) of this section shall first be attempted in accordance with the provision of paragraphs (a)(1) (i), (ii), and (iii) of this section.

(b) *By other parties.* Service of documents by parties other than the Commission shall be by delivering copies thereof as follows: Upon the Commission, by personal delivery or delivery by first-class mail to the Office of the Secretary of the Commission and, in adjudicative proceedings under part 3 of the Commission's Rules of Practice, to the Assistant Director in the Bureau of Competition, the Associate Director in the Bureau of Consumer Protection, or the Director of the Regional Office of complaint counsel. Upon a party other than the Commission or Commission counsel, service shall be by personal delivery or delivery by first-class mail. If the party is an individual or partnership, delivery shall be to such individual or a member of the partnership; if a corporation or unincorporated association, to an officer or agent authorized to accept service of process therefor. Personal service includes handing the document to be served to the individual, partner, officer, or agent; leaving it at his or her office with a person in charge thereof; or, if there is no one in charge or if the office is closed or if the party has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Documents served in adjudicative proceedings under part 3 of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office.

(c) *Proof of service.* In an adjudicative proceeding under part 3 of the Commission's Rules of Practice, papers presented for filing by a party respondent or intervenor shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.

## PART 4 – MISCELLANEOUS RULES

### **§4.5 Fees.**

(a) *Deponents and witnesses.* Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) *Presiding officers.* Officers before whom depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States.

(c) *Responsibility.* The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear.

**§4.6 Cooperation with other agencies.** It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

### **§4.7 Ex parte communications.**

(a) *Definitions.* For purposes of this section, *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

(b) *Prohibited ex parte communications.* While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an *ex parte* communication relevant to the merits of that or a factually related proceeding; and

(2) No member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, an *ex parte* communication relevant to the merits of that or a factually related proceeding.

(c) *Procedures.* A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who make or knowingly causes to be made, a communication prohibited by paragraph (b) of this section shall promptly provide to the Secretary of the Commission:

(1) All such written communications;

(2) Memoranda stating the substance of and circumstances of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c)(1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to §4.9, and place them in the docket binder of the proceeding to which it pertains, but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

(d) *Sanctions.*

(1) Upon receipt of an *ex parte* communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Commission, Administrative Law Judge, or other employee presiding over the proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation. The Commission may take such action as

#### PART 4 – MISCELLANEOUS RULES

it considers appropriate, including but not limited to, action under §4.1(e)(2) and 5 U.S.C. 556(d).

(2) A person, not a party to the proceeding who knowingly makes or causes to be made an *ex parte* communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided herein if he subsequently becomes a party to the proceeding.

(e) The prohibitions of this section shall apply in an adjudicative proceeding from the time the Commission votes to issue a complaint pursuant to §3.11, to conduct adjudicative hearings pursuant to §3.13, or to issue an order to show cause pursuant to §3.72(b), or from the time an order by a U.S. court of appeals remanding a Commission decision and order for further proceedings becomes effective, until the time the Commission votes to enter its decision in the proceeding and the time permitted by §3.55 to seek reconsideration of that decision has elapsed. For purposes of this section, an order of remand by a U.S. court of appeals shall be deemed to become effective when the Commission determines not to file a petition for a writ of *certiorari*, or when the time for filing such a petition has expired without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Commission decision is filed pursuant to §3.55, the provisions of this section shall apply until the time the Commission votes to enter an order disposing of the petition. In addition, the prohibitions of this section shall apply with respect to communications concerning an application for stay filed with the Commission pursuant to §3.56 from the time that the application is filed until its disposition.

(f) The prohibitions of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation, the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; preparations for judicial review of a Commission order; a proceeding outside the scope of §3.2, including a matter in state or federal court or before another governmental agency; a

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

nonadjudicative function of the Commission, including but not limited to an obligation under §4.11 or a communication with Congress; or the disposition of a consent settlement under §3.25 concerning some or all of the charges involved in a complaint and executed by some or all respondents. The Commission, at its discretion and under such restrictions as it may deem appropriate, may disclose to the public or to respondent(s) in a pending adjudicative proceeding a communication made exempt by this paragraph from the prohibitions of paragraph (b) of this section, however, when the Commission determines that the interests of justice would be served by the disclosure. The prohibitions of paragraph (b) of this section also do not apply to a communication between any member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process, and any employee who has been directed by the Commission or requested by an individual Commissioner or Administrative Law Judge to assist in the decision of the adjudicative proceeding. Such employee shall not, however, have performed an investigative or prosecuting function in that or a factually related proceeding.

### **§4.8 Costs for obtaining Commission records.**

(a) *Definitions.* For the purpose of this section:

(1) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

(2) The term *duplication* refers to the process of making a copy of a document in order to respond to a request for Commission records.

(3) The term *review* refers to the examination of documents located in response to a request to determine whether any portion of such documents may be withheld, and the reduction or other processing of documents for disclosure. Review does not include time spent resolving general legal or policy issues regarding the release of the document.

#### PART 4 – MISCELLANEOUS RULES

(4) The term *direct costs* means expenditures that the Commission actually incurs in processing requests. Not included in direct costs are overhead expenses such as costs of document review facilities or the costs of heating or lighting such a facility or other facilities in which records are stored. The direct costs of specific services are set forth in §4.8(b)(6).

(b) *Fees*. User fees pursuant to 31 U.S.C. 483(a) and 5 U.S.C. 552(a) shall be charged according to this paragraph.

(1) *Commercial use requesters*. Commercial use requesters will be charged for the direct costs to search for, review, and duplicate documents. A commercial use requester is a requester who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(2) *Educational requesters, non-commercial scientific institution requesters, and representative of the news media*. Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages. An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to conduct scientific research the results of which are not intended to promote any particular product or industry. A *representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public.

(3) *Other requesters*. Other requesters will be charged for the direct costs to search for and duplicate documents, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(4) *Waiver of small charges.* Notwithstanding the provisions of paragraphs (b) (1), (2), and (3), charges will be waived if the total chargeable fees for a request do not exceed \$5.00.

(5) *Materials available without charge.* These provisions do not apply to recent Commission decisions and other materials that may be made available to all requesters without charge while supplies last.

(6) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission.

### Duplication

#### Paper Copy (up to 8½" × 14")

(Reproduced by Commission staff) . . . . .	\$0.14 per page
(Reproduced by Requester) . . . . .	\$0.05 per page
Computer Paper . . . . .	\$0.14 per page

#### Microfilm Services

Film Copy – Paper to 16mm film . . . . .	\$0.02 per frame
Fiche Copy – Paper to 105mm fiche . . . . .	\$0.02 per frame
	+ \$0.23 per fiche
Film Copy – Duplication of existing 100 ft. roll of 16mm film . . . . .	\$3.35 per roll
Fiche Copy – Duplication of existing 105mm fiche . . . . .	\$0.04 per roll
Paper Copy – Converting existing 16mm film to paper (Conversion by Commission staff) . . . . .	\$0.23 per page
(Conversion by Requester) . . . . .	\$0.14 per page
Paper Copy – Converting existing 105mm fiche to paper (Conversion by Commission staff) . . . . .	\$0.23 per page
(Conversion by Requester) . . . . .	\$0.14 per page
Film Cassettes . . . . .	\$3.60 per cassette

#### Other Charges

Computer Tape . . . . .	\$18.50 per tape
Certification . . . . .	\$10.35 each

#### PART 4 – MISCELLANEOUS RULES

Express Mail . . . . . \$5.00 for the first pound  
and \$.89 for each additional pound (per request)

##### **Search and Review Fees**

Agency staff is divided into three categories: clerical, attorney/economist, and other professional. Fees for search and review are assessed on a quarter-hourly basis, and are determined by identifying the category into which the staff member(s) conducting the search or review belong(s), determining the average quarter-hourly wages of all staff members within that category, and adding 16 percent to reflect the cost of additional benefits accorded to government employees. The exact fees are calculated and announced periodically and are available from the Public Reference Section, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580; (202) 326-2222.

(c) *Information to determine fees.* Each request for records shall set forth whether the request is made for other than commercial purposes and whether the requester is an educational institution, a noncommercial scientific institution, or a representative of the news media. The Deputy Executive Director for Planning and Information or the Director of the Information Services Division initially, or the General Counsel or Commission on appeal, will use this information, any additional information provided by the requester, and any other relevant information to determine the appropriate fee category in which to place the requester.

(d) *Agreement to pay fees.*

(1) Each request that does not contain an application for a fee waiver shall specifically indicate the requester's willingness either:

(i) To pay, in accordance with §4.8(b) of these rules, whatever fees may be charged for processing the request; or

(ii) A willingness to pay such fees up to a specified amount.

(2) Each request that contains an application for a fee waiver must specifically indicate:

(i) The requester's willingness to pay, in accordance with §4.8(b) of the rules, whatever fees may be charged for processing the request;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(ii) The requester's willingness to pay fees up to a specified amount; or

(iii) That the requester is not willing to pay fees if the waiver is not granted.

(3) If the agreement required by this section is absent, and if the estimated fees exceed \$25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees.

(e) *Public interest fee waivers.*

(1) *Procedures.* A requester may apply for a waiver of fees. The requester shall explain why a waiver is appropriate under the standards set forth in this paragraph. The application shall also include a statement, as provided by paragraph (d) of this section, of whether the requester agrees to pay costs if the waiver is denied. The Deputy Executive Director for Planning and Information or the Director of the Information Services Division initially, and the General Counsel or Commission on appeal, will rule on applications for fee waivers.

(2) *Standards.*

(i) The first requirement for a fee waiver is that disclosure will likely contribute significantly to public understanding of the operations or activities of the government. This requirement shall be met if:

(A) The subject matter of the requested information concerns the operations or activities of the Federal Government;

(B) The disclosure is likely to contribute to an understanding of these operations or activities;

(C) The understanding to which disclosure is likely to contribute is the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons; and

(D) The likely contribution to public understanding will be significant.

(ii) The second requirement for a fee waiver is that the request not be primarily in the commercial interest of the requester. Satisfaction of this requirement shall be determined by considering:

#### PART 4 – MISCELLANEOUS RULES

(A) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(B) If so, whether the public interest in disclosure is outweighed by the identified commercial interest of the requester so as to render the disclosure primarily in the requester's commercial interest.

(f) *Unsuccessful searches.* Charges may be assessed for search time even if the agency fails to locate any responsive records or if it locates only records that are determined to be exempt from disclosure.

(g) *Aggregating requests.* If the Deputy Executive Director for Planning and Information or the Director of the Information Services Division initially, or the General Counsel or Commission on appeal, reasonably believes that a requester, or a group of requesters acting in concert, is attempting to evade an assessment of fees by dividing a single request into a series of smaller requests, the requests may be aggregated and fees charged accordingly.

(h) *Advance payment.* If the Deputy Executive Director for Planning and Information or the Director of the Information Service Division initially, or the General Counsel or Commission on appeal, estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00, or if the requester has previously failed to pay a fee within 30 days of the date of billing, the requester may be required to pay some or all of the total estimated charge in advance. Further, the requester may be required to pay all unpaid bills, including accrued interest, prior to processing the request.

(i) *Means of payment.* Payment shall be made by check or money order payable to the Treasury of the United States, or by credit card. Procedures for paying fees by credit card are available from the Public Reference Section, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580; (202) 326-2222.

(j) *Interest charges.* The Commission will begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will accrue from the date of the billing, and will be calculated at the rate prescribed in 31 U.S.C. 3717.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(k) *Effect of the Debt Collection Act of 1982 (Pub. L. 97-365).* The Commission may pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act, Public Law 97-365, including disclosure to consumer reporting agencies and use of collection agencies.

### **§4.9 The public record.**

#### (a) *General.*

(1) Materials on the public record of the Commission are available for public inspection and copying either routinely or upon request.

(2) Materials that are exempt from mandatory public disclosure, or are otherwise not available from the Commission's public record, may be made available for inspection and copying only upon request under the procedures set forth in §4.11 of this part, or as provided in §§4.10 (d) through (g), 4.13, and 4.15(b)(3) of this part, or by the Commission.

(3) *Location.* Materials on the public record are available for inspection at the principal office of the Commission, and copies of some of those records are available at the regional offices, on each business day from 9 a.m. to 5 p.m.

#### (4) *Copying of public records.*

(i) *Procedures.* Reasonable facilities for copying public records are provided at each office of the Commission. Subject to appropriate limitations and the availability of facilities, any person may copy public records available for inspection at each of those offices. Further, the agency will provide copies to any person upon request. Written requests for copies of public records should be addressed to the Director of the Information Services Division, and should specify as clearly and accurately as reasonably possible the records desired. For records that cannot be specified with complete clarity and particularity, requesters must provide descriptions sufficient to enable qualified Commission personnel to locate the records sought. In any instance, the Commission, the Deputy Executive Director for Planning and Information, the Director of the Information Services Division, or

#### PART 4 – MISCELLANEOUS RULES

the official in charge of each office may prohibit the use of Commission facilities to produce more than one copy of any public record, and may refuse to permit the use of such facilities for copying records that have been published or are publicly available at places other than the offices of the Commission.

(ii) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). Advance payment may be required, as provided by §4.8(h).

(iii) *Records for sale at another government agency.* If requested materials are available for sale at a another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(b) *Categories.* Except to the extent material is confidential, as provided in paragraph (c) of this section, the public record of the Commission includes, but is not necessarily limited to:

(1) *Commission Organization and Procedures (16 CFR part 0 and §§4.14 through 4.15, 4.17).*

(i) A current index of opinions, orders, statements of policy and interpretations, administrative staff manuals, general instructions and other public records of the Commission;

(ii) A current record of the final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting;

(iii) Descriptions of the Commission's organization, including descriptions of where, from whom, and how the public may secure information, submit documents or requests, and obtain copies of orders, decisions and other materials;

(iv) Statements of the Commission's general procedures and policies and interpretations, its nonadjudicative procedures, its rules of practice for adjudicative proceedings, and its miscellaneous rules,

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

including descriptions of the nature and requirements of all formal and informal procedures available, and

(v) Reprints of the principal laws under which the Commission exercises enforcement or administrative responsibilities.

(2) *Industry Guidance (16 CFR 1.1 - 1.6).*

(i) Any advice, advisory opinion or response given and required to be made public under §§1.4 and 2.41 (d) or (f) of this chapter (whether by the Commission or the staff), together with a statement of supporting reasons;

(ii) Industry guides, digests of advisory opinions and compliance advice believed to be of interest to the public generally and other administrative interpretations;

(iii) Transcripts of hearings in all industry guide proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings; and

(iv) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of industry guides.

(3) *Rulemaking (16 CFR 1.7 through 1.26).*

(i) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of rules or regulations within the scope of §§1.7 and 1.21 of this chapter, and petitions for exemptions;

(ii) Notices and advance notices of proposed rulemaking and rules and orders issued in rulemaking proceedings; and

(iii) Transcripts of hearings of all rulemaking proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings.

(4) *Investigations (16 CFR 2.7).*

(i) Petitions to limit or quash compulsory process and the rulings thereon, requests for review by the full Commission of those rulings, and Commission rulings on such requests; and

(ii) Closing letters in initial phase and full phase investigations.

(5) *Adjudicative proceedings, stay applications, requests to reopen, and litigated orders. (16 CFR 2.51, 3.1 through 3.24, 3.31 through 3.56, 3.71 through 3.72, 4.7).* Except for transcripts of

#### PART 4 – MISCELLANEOUS RULES

matters heard *in camera* pursuant to §3.45 and material filed *in camera* pursuant to §§3.22, 3.24, 3.45, 3.46, 3.51 and 3.52,

(i) The versions of pleadings and transcripts of prehearing conferences to the extent made available under §3.21(e), motions, certifications, orders, and the transcripts of hearings (including public conferences), testimony, oral arguments, and other material made a part thereof, and exhibits and material received in evidence or made a part of the public record in adjudicative proceedings;

(ii) Initial decisions of administrative law judges;

(iii) Orders and opinions in interlocutory matters;

(iv) Final orders and opinions in adjudications, and rulings on stay applications, including separate statements of Commissioners;

(v) Petitions for reconsideration, and answers thereto, filed pursuant to §3.55;

(vi) Applications for stay, answers thereto, and replies, filed pursuant to §3.56;

(vii) Petitions, applications, pleadings, briefs, and other records filed by the Commission with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in connection with judicial review of Commission actions, and opinions and orders of the courts in disposition thereof;

(viii) Records of *ex parte* communications in adjudicative proceedings and stay applications;

(ix) Petitions to reopen proceedings and orders to determine whether orders should be altered, modified, or set aside in accordance with §2.51; and

(x) Decisions reopening proceedings, and orders to show cause under §3.72.

(6) *Consent Agreements (16 CFR 2.31 through 2.34, 3.25).*

(i) Agreements containing orders, after acceptance by the Commission pursuant to §§2.34 and 3.25(f) of this chapter;

(ii) Comments filed under §§2.34 and 3.25(f) of this chapter concerning proposed consent agreements; and



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(iii) Final decisions and orders issued after the comment period prescribed in §§2.34 and 3.25(f), including separate statements of Commissioners.

(7) *Compliance/Enforcement (16 CFR 2.33, 2.41).*

(i) Reports of compliance filed pursuant to the rules in this chapter or pursuant to a provision in a Commission order and supplemental materials filed in connection with these reports, except for reports of compliance, and supplemental materials filed in connection with Commission orders requiring divestitures or establishment of business enterprises or facilities, which are confidential until the last divestiture or establishment of a business enterprise or facility, as required by a particular order, has been finally approved by the Commission, and staff letters to respondents advising them that their compliance reports do not warrant any further action. At the time each such report is submitted the filing party may request confidential treatment in whole or in part and submit satisfactory reasons therefor, and the General Counsel with due regard for statutory restrictions, the Commission's rules and the public interest will pass upon such request;

(ii) Requests for advice concerning proposed mergers and material required to be made public under §2.41(f) of the Commission Rules; and

(iii) Applications for approval of proposed divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders together with supporting materials, objections and comments concerning these transactions submitted by the public and Commission responses.

(8) *Access to Documents and Meetings (16 CFR 4.8, 4.11, 4.13, 4.15).*

(i) Letters requesting access to Commission records pursuant to §4.11(a) of this chapter and the Freedom of Information Act, 5 U.S.C. 552, and letters granting or denying such requests (not including access requests and answers thereto from the Congress or other government agencies);

#### PART 4 – MISCELLANEOUS RULES

(ii) Announcements of Commission meetings as required under the Sunshine Act, 5 U.S.C. 552b, including records of the votes to close such meetings;

(iii) Summaries or other explanatory materials relating to matters to be considered at open meetings made available pursuant to §4.15(b)(3) of this chapter; and

(iv) Commission minutes of open meetings, and, to the extent they are not exempt from mandatory public disclosure under the Sunshine Act or the Freedom of Information Act, portions of minutes or transcripts of closed meetings.

(9) *Standards of Conduct (16 CFR 5.5 through 5.6, 5.10 through 5.26, 5.31, 5.57 through 5.68).*

(i) Memoranda to staff elaborating or clarifying standards described in administrative staff manuals and part 5 of this subchapter.

(10) *Miscellaneous (Press Releases, Clearance Requests, Reports Filed by or with the Commission, Continuing Guaranties, Registered Identification Numbers).*

(i) Releases by the Commission's Office of Public Affairs supplying information concerning the activities of the Commission;

(ii) Applications under §4.1(b)(2) of this chapter for clearance or authorization to appear or participate in a proceeding or investigation and of the Commission's responses thereto;

(iii) Continuing guaranties filed under the Wool, Fur, and Textile Acts;

(iv) Published reports by the staff or by the Commission on economic surveys and investigations of general interest;

(v) Filings by the Commission or by the staff in connection with proceedings before other federal agencies or state or local government bodies;

(vi) Registration statements and annual reports filed with the Commission by export trade associations, and bulletins, pamphlets, and reports with respect to such associations released by the Commission;

(vii) The identities of holders of registered identification numbers issued by the Commission pursuant to §1.32 of this chapter;

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(viii) The Commission's annual report submitted after the end of each fiscal year, summarizing its work during the year (available for inspection at each of the offices of the Commission with copies obtainable from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402) and any other annual reports made to Congress on activities of the Commission as required by law; and

(ix) Every amendment, revision, substitute, or repeal of any of the foregoing items listed in §4.9(b)(1) through (10) of this section.

(c) *Confidentiality and in camera material.*

(1) Persons submitting material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. No such material or portions of material (including documents generated by the Commission or its staff containing or reflecting such material or portions of material) will be placed on the public record pursuant to this section until the General Counsel has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law. All requests for confidential treatment shall be supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority.

(2) Motions seeking *in camera* treatment of material submitted in connection with a proceeding under part 3 of these rules, except stay applications under §3.56, shall be filed with the Administrative Law Judge who is presiding over the proceeding. Requests for confidential treatment of material submitted in connection with a stay application shall be made in accordance with §4.9(c)(1).

(3) To the extent that any material or portions of material otherwise falling within §4.9(b) contain information that is not required to be made public under §4.10 of this part, the General Counsel may determine to withhold such materials from the public record.

### **§4.10 Nonpublic material.**

#### PART 4 – MISCELLANEOUS RULES

(a) The following records and other material of the Commission are not required to be made public pursuant to 5 U.S.C. 552.

(1) Records, except to the extent required to be disclosed under other laws or regulations, related solely to the internal personnel rules and practices of the Commission. This exemption applies to internal rules or instructions to Commission personnel which must be kept confidential in order to assure effective performance of the functions and activities for which the Commission is responsible and which do not affect members of the public.

(2) Trade secrets and commercial or financial information obtained from a person and privileged or confidential. As provided in section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), this exemption applies to competitively sensitive information, such as costs or various types of sales statistics and inventories. It includes trade secrets in the nature of formulas, patterns, devices, and processes of manufacture, as well as names of customers in which there is a proprietary or highly competitive interest.

(3) Interagency or intra-agency memoranda or letters which would not routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other and with officials and employees of other governmental agencies. This exemption includes records of the deliberations of the Commission except for the record of the final votes of each member of the Commission in every agency proceeding. It includes intra-agency and interagency reports, memorandums, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Commission or between the Commission and other governmental agencies. It also includes information scheduled for public release, but as to which premature release would be contrary to the public interest;

(4) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy except to the extent such files or materials must be disclosed

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

under other laws or regulations. This exemption applies to personnel and medical records and similar records containing private or personal information concerning any individual which, if disclosed to any person other than the individual concerned or his designated legal representative without his permission in writing, would constitute a clearly unwarranted invasion of personal privacy. Examples of files exempt from disclosure include, but are not limited to:

- (i) The personnel records of the Commission;
- (ii) Files containing reports, records or other material pertaining to individual cases in which disciplinary or other administrative action has been or may be taken, including records of proceedings pertaining to the conduct or performance of duties by Commission personnel;
- (5) Records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information:
  - (i) Could reasonably be expected to interfere with enforcement proceedings;
  - (ii) Would deprive a person of a right to a fair trial or an impartial adjudication;
  - (iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;
  - (iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;
  - (v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
  - (vi) Could reasonably be expected to endanger the life or physical safety of any individual.

#### PART 4 – MISCELLANEOUS RULES

(6) Information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(7) Geological and geophysical information and data, including maps, concerning wells; and

(8) *Material*, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission:

(i) In an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission; and

(ii) Which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, or which is provided voluntarily in place of compulsory process in such an investigation. See section 21(f) of the Federal Trade Commission Act.

(9) *Material*, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. See section 21(b)(3)(C) of the Federal Trade Commission Act.

(10) Such other material of the Commission as may from time to time be designated by the Commission as confidential pursuant to statute or Executive Order. This exempts from disclosure any information that has been designated nonpublic pursuant to criteria and procedures prescribed by Executive Order and that has not been subsequently declassified in accordance with applicable procedures. The exemption also preserves the full force and effect of statutes that restrict public access to specific government records or material.

(11) Material in an investigation or proceeding that involves a possible violation of criminal law, when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings. When a request is made for records under §4.11(a), the Commission

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

may treat the records as not subject to the requirements of the Freedom of Information Act.

(b) With respect to information contained in transcripts of Commission meetings, the exemptions contained in paragraph (a) of this section, except for paragraphs (a)(3) and (a)(7) of this section, shall apply; in addition, such information will not be made available if it is likely to have any of the effects described in 5 U.S.C. 552b (c)(5), (c)(9), or (c)(10).

(c) Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars (\$5,000), or by imprisonment not exceeding 1 year, or by fine and imprisonment, in the discretion of the court.

(d) Except as provided in paragraphs (f) and (g) of this section and in §4.11 (b), (c), and (d), no material which is marked or otherwise identified as confidential and which is within the scope of §4.10(a)(8) and no material which is within the scope of §4.10(a)(9) which is not otherwise public shall be made available to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information without the consent of the person who produced the material. All other Commission records may be made available to a requester under the procedures set forth in §4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) and (g) of this section and in §4.11 (b), (c), and (d), material not within the scope of §4.10(a)(8) or §4.10(a)(9) which is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it is determined that the material is not within the scope of §4.10(a)(2), and only if the submitter is provided at least 10 days' notice of the intent to disclose the material involved.

#### PART 4 – MISCELLANEOUS RULES

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of §4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

(1) Through compulsory process or voluntarily in lieu thereof, and protected by sections 21 (b) and (f) of the Federal Trade Commission Act, 15 U.S.C. 57b - 2 (b), (f), and 4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b - 2(c), and §4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and §4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

#### **§4.11 Disclosure requests.**

(a) *Freedom of Information Act requests.*

(1) *Initial requests.*

(i) *Form and contents; time of receipt.*

(A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows:



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

Freedom of Information Act Request  
Office of the Deputy Executive Director for Planning and Information  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, NW.  
Washington, DC 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section will result in the request being treated as received on the date the request is actually received by the processing unit in the Office of the Deputy Executive Director for Planning and Information.

(C) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). An advance payment may be required in appropriate cases as provided by §4.8(h).

(D) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to Rule 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees and is not granted a fee waiver, the request will be denied.

(E) *Records for sale at another government agency.* If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

### (ii) *Identifiability.*

(A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any

#### PART 4 – MISCELLANEOUS RULES

other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination.*

(A) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall, within ten (10) working days of the receipt of a request, either grant or deny, in whole or in part, such request.

(B) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division may extend this time limit by not more than ten working days if such extension is:

(1) Necessary for locating records or transferring them from physically separate facilities; or

(2) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(3) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject matter interest therein.

(C) If the Deputy Executive Director for Planning and Information or the Director of the Information Services Division extends the time limit for initial determination pursuant to paragraph (A)(1)(iii)(B), the requester shall be notified in accordance with 5 U.S.C. 552(A)(6)(B).

(D) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination.*

(A) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall grant access

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

to requested records, or any portions thereof, that must be made available under the Freedom of Information Act. He shall deny access to records that are exempt under the Freedom of Information Act (5 U.S.C. 552(b)), unless he determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials shall set forth the reasons therefore and advise the requester that this determination can be appealed to the General Counsel either because the requester believes the records are not exempt, or because the requester believes the General Counsel should exercise his discretion to release such records notwithstanding their exempt status.

(B) The Deputy Executive Director for Planning and Information or the Director of the Information Services Division is deemed to be the sole official responsible for all denials of initial requests, except denials to materials contained in active investigatory files in which case the Director or Deputy Director of the Bureau or the Director of the Regional Office responsible for the investigation shall be the responsible official.

(C) Records to which access has been granted will be made available to the requester and will remain available for inspection and copying for a period not to exceed thirty days from date of notification to the requester unless the requester asks for and receives the consent of the Deputy Executive Director for Planning and Information or the Director of the Information Services Division to a longer period. Records assembled pursuant to a request will remain available only during this period and thereafter will be refiled. Appropriate fees may again be imposed for any new or renewed request for the same records.

(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials.*

(i) *Form and contents; time of receipt.*

#### PART 4 – MISCELLANEOUS RULES

(A) If an initial request for records is denied in its entirety, the requester may, within 30 days of the date of the determination appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal shall not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available. The appeal shall be in writing and should include a copy of the initial request and a copy of the response to that initial request, if any. The appeal shall be addressed as follows:

Freedom of Information Act Appeal  
Office of the General Counsel  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, NW.  
Washington, DC 20580.

(B) Failure to mark the envelope and the appeal, in accordance with paragraph (a)(2)(i)(A) of this section, will result in the appeal being treated as received on the date the appeal is actually received by the Office of the General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.*

(A) The General Counsel shall, within twenty (20) working days of the receipt of an appeal, either grant or deny the appeal, in whole or in part.

(B) The Commission or the General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), extend the time limit for deciding an appeal by not more than ten (10) working days for the reasons set forth in paragraph (a)(1)(iii)(B) of this section, provided that the amount of any extension utilized during the initial consideration of the request under that subsection shall be subtracted from the amount of additional time otherwise available.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### (iii) *Determination of appeal.*

(A) The General Counsel shall have the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases he may, in his sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part shall set forth the basis for the denial, and shall advise the requester that judicial review of the decision is available either in the district in which the requester resides or has a principal place of business, in the district in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of §4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request. The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government shall be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from state agencies shall be addressed to the General Counsel. With respect to requests

#### PART 4 – MISCELLANEOUS RULES

under this paragraph, the General Counsel or the appropriate liaison officer is delegated the authority to dispose of them or may refer them to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel or liaison officer will obtain from the requester a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature of the law enforcement activity and the anticipated relevance of the information to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access not related to law enforcement should be addressed to the General Counsel. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act. Requests under this section shall be subject to the fee and fee waiver provisions of §4.8.

(e) *Material and information requested by subpoena in cases or matters to which the agency is not a party.*

(1) The procedures specified in this section will apply to all subpoenas directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to subpoenas directed to former Commission employees and current or former special government employees of the Commission, if the subpoenas seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply to subpoenas directed to the agency. For purposes of this section, the term *subpoena* includes any compulsory process in a case

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

or matter to which the agency is not a party; the term *nonpublic* includes any material or information which, under §4.10, is not required to be made public; the term *employees*, except where otherwise specified, includes “special government employees” and other agency employees; and the term *special government employees* includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with a subpoena shall promptly advise the General Counsel of the service of the subpoena, the nature of the material or information sought, and all relevant facts and circumstances.

(3) A party causing a subpoena to be issued to the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether agency records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *Touhy v. Ragen*, 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon subpoenas under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account factors such as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for

#### PART 4 – MISCELLANEOUS RULES

determining whether justification exists for the disclosure of confidential information and material.

(f) Requests by current or former employees to use nonpublic memoranda as writing samples shall be addressed to the General Counsel. The General Counsel is delegated the authority to dispose of such requests consistent with applicable nondisclosure provisions, including sections 6(f) and 21 of the FTC Act.

(g) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, or regulation. However, an employee shall not use information obtained as a result of his Government employment, except to the extent that such information has been made available to the general public or will be made available on request, or when the General Counsel gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

#### **§4.12 Disposition of documents submitted to the Commission.**

(a) *Material submitted to the Commission.*

(1) Any person who has submitted material to the Commission may obtain, on request, the return of material submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation.

(2) Such request shall be in writing, addressed to the custodian designated pursuant to §2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the material requested. A request for return of material may be filed at any time, but material will not be returned nor will commitments to return material be undertaken prior to the time described in this paragraph.



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(b) *Commission-made copies of documents submitted to the Commission.* The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

(c) *Disposition of material not returned.* Subsequent to the time prescribed in paragraph (a) of this section, the staff will examine all submitted material and Commission-made copies of documents located in a reasonable search of the Commission's files and will determine, consistent with the Federal Records Act, 44 U.S.C. 3301, which materials are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all material determined not to be appropriate for preservation in accordance with applicable regulations of the National Archives and Records Administration.

### **§4.13 Privacy Act rules.**

(a) *Purpose and scope.*

(1) This section is promulgated to implement the Privacy Act of 1974 (Pub. L. 93-579, 5 U.S.C. 552a) by establishing procedures whereby an individual can, as to all systems of records maintained by the Commission except those set forth in §4.13(m) as exempt from disclosure, (i) Request notification of whether the Commission maintains a record pertaining to him in any system of records, (ii) request access to such a record or to an accounting of its disclosure, (iii) request that the record be amended or corrected, and (iv) appeal an initial adverse determination of any such request. This section also establishes those systems of records that are specifically exempt from disclosure and from other requirements.

(2) The procedures of this section apply only to requests by an individual as defined in §4.13(b). Except as otherwise provided, they govern only records containing personal information in systems of

#### PART 4 – MISCELLANEOUS RULES

records for which notice has been published by the Commission in the *Federal Register* pursuant to section 552a(e)(4) of the Privacy Act of 1974 and which are neither exempt from the provisions of this section nor contained in government-wide systems of personnel records for which notice has been published in the *Federal Register* by the Office of Personnel Management. Requests for notification, access, and amendment of personnel records which are contained in a system of records for which notice has been given by the Office of Personnel Management are governed by the Office of Personnel Management's notices, 5 CFR part 297. Access to records which are not subject to the requirements of the Privacy Act are governed by §§4.8 through 4.11.

(b) *Definitions.* The following definitions apply to this section only:

(1) *Individual* means a natural person who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) *Record* means any item, collection, or grouping of personal information about an individual that is maintained by the Commission, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph, but does not include information concerning proprietorships, businesses, or corporations.

(3) *System of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual, for which notice has been published by the Commission in the *Federal Register* pursuant to 5 U.S.C. 552a(e)(4).

(c) *Procedures for requests pertaining to individual records in a record system.* An individual may request access to his records or any information pertaining to him in a system of records, and notification of whether and to whom the Commission has disclosed a record for which an accounting of disclosures is required to be kept and made

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

available to him, using the procedures of this subsection. Requests for the disclosure of records under this subsection or to determine whether a system of records contains records pertaining to an individual or to obtain an accounting of disclosures, shall be in writing and if mailed, addressed as follows:

Privacy Act Request  
Office of the Deputy Executive Director for Planning and Information  
Federal Trade Commission  
6th Street and Pennsylvania Avenue NW.  
Washington, DC 20580.

If requests are presented in person at the Office of the Deputy Executive Director for Planning and Information, the individual shall be required to execute a written request. All requests must name the system of records which is the subject of the request, and must include any additional information specified in the pertinent system notice as necessary to locate the records requested. If the requester desires to permit a person to accompany him to review his record, the request shall so state. Nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(d) *Times, places, and requirements for identification of individuals making requests.* Verification of identity of persons making written requests to the Deputy Executive Director for Planning and Information ordinarily will not be required. The signature upon such requests shall be deemed to be a certification by the person signing that he is the individual to whom the record pertains or the parent of a minor or the duly appointed legal guardian of the individual to whom the record pertains. The Deputy Executive Director for Planning and Information may require additional verification of identity as specified by him when necessary reasonably to assure that records are not improperly disclosed; *provided, however*, that no verification of identity will be required where the records sought are publicly available under the Freedom of Information Act.

#### PART 4 – MISCELLANEOUS RULES

(e) *Disclosure of requested information to individuals.* Within ten (10) working days of receipt of a request under §4.13(c) the Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall acknowledge receipt of the request. Within thirty (30) working days of the receipt of a request under §4.13(c) the Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall inform the requester whether a system of records containing retrievable information pertaining to the requester exists, and if so, either that his request has been granted or that the requested records or information is exempt from disclosure pursuant to §4.13(m). When, for good cause shown, the Deputy Executive Director for Planning and Information or the Director of the Information Services Division is unable to respond within thirty (30) working days of the receipt of the request, he shall notify the requester of that fact and approximately when it is anticipated that a response will be made.

(f) *Special procedures: Medical records.* When the Deputy Executive Director for Planning and Information or the Director of the Information Services Division determines that disclosure of a medical or psychological record directly to a requesting individual could have an adverse effect on the individual, he shall require the individual to designate a medical doctor to whom the record will be transmitted.

(g) *Request for correction or amendment of record.* An individual to whom access to his records or any information pertaining to him in a system of records has been granted may request that any portion thereof be amended or corrected because he believes it is not accurate, relevant, timely, or complete. An initial request for correction or amendment of a record shall be in writing whether presented in person or by mail, and if by mail, addressed as in §4.13(c). In making a request under this subsection, the requesting party shall state the nature of the information in the record the individual believes to be inaccurate, irrelevant, untimely, or incomplete, the correction or amendment desired, and the reasons therefore.

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(h) *Agency review of request for correction or amendment of record.* Whether presented in person or by mail, requests under §4.13(g) shall be acknowledged by the Deputy Executive Director for Planning and Information or the Director of the Information Services Division within ten (10) working days of the receipt of the request if action on the request cannot be completed and the individual notified of the results within that time. Thereafter, the Deputy Executive Director for Planning and Information or the Director of the Information Services Division shall promptly either make the requested amendment or correction or inform the requester of his refusal to make the amendment or correction, the reasons for the refusal, and the requester's right to appeal that determination in accordance with §4.13(i).

(i) *Appeal of initial adverse agency determination.*

(1) If an initial request is denied under §4.13(c) or §4.13(g), the requester may appeal that determination to the Commission. The appeal shall be in writing and addressed as follows:

Privacy Act Appeal  
Office of the General Counsel  
Federal Trade Commission  
6th Street and Pennsylvania Avenue, NW.  
Washington, DC 20580

The Commission shall notify the requester within thirty (30) working days of the receipt of his appeal of the disposition of that appeal, except that the thirty (30) day period may be extended for good cause, in which case the requester will be advised of the approximate date on which review will be completed.

(2)(i) If the Commission refuses to amend or correct the record in accordance with a request under §4.13(g), it shall notify the requester of that determination and inform him of his right to file with the Deputy Executive Director for Planning and Information of the Commission a concise statement setting forth the reasons for his disagreement with that determination and the fact that such a

#### PART 4 – MISCELLANEOUS RULES

statement will be treated as set forth in paragraph (i)(2)(ii) of this section. The Commission shall also inform the requester that judicial review of the determination is available by a civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(ii) If the individual files a statement disagreeing with the Commission's determination not to amend or correct a record, it shall be clearly noted in the record involved and made available to anyone to whom the record has been disclosed after September 27, 1975, or is subsequently disclosed together with, if the Commission deems it appropriate, a brief statement of the reasons for refusing to amend the record.

(j) *Disclosure of record to person other than the individual to whom it pertains.* Except as provided by 5 U.S.C. 552a(b), the written request or prior written consent of the individual to whom a record pertains, or of his parent if a minor, or legal guardian if incompetent, shall be required before such record is disclosed. If the individual elects to inspect a record in person and desires to be accompanied by another person, the Deputy Executive Director for Planning and Information or the Director of the Information Services Division may require the individual to furnish a signed statement authorizing his record to be disclosed in the presence of the accompanying named person.

(k) *Fees.* No fees shall be charged for searching for a record, reviewing it, or for copies of records made by the Commission for its own purposes incident to granting access to a requester. Copies of records to which access has been granted under this section may be obtained by the requester from the Deputy Executive Director for Planning and Information upon payment of the reproduction fees provided in §4.8(b)(6).

(l) *Penalties.* Section 552a(i)(3) of the Privacy Act, 5 U.S.C. 552a(i)(3), makes it a misdemeanor, subject to a maximum fine of \$5,000, to knowingly and willfully request or obtain any record

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

concerning an individual under false pretenses. Sections 552a(i) (1) and (2) of the Privacy Act, 5 U.S.C. 552a(i) (1) and (2), provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder. Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of \$10,000 or imprisonment for not more than 5 years or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

### (m) *Specific exemptions.*

(1) Pursuant to 5 U.S.C. 552a(j)(2), investigatory materials maintained by an agency component in connection with any activity relating to criminal law enforcement in the following systems of records are exempt from all subsections of 5 U.S.C. 552a, except (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i), and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(j)(2):

#### Office of Inspector General Investigative Files – FTC

(2) Pursuant to 5 U.S.C. 552a(k)(2), investigatory materials compiled for law enforcement purposes in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (i), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 552a(k)(2):

#### Investigational, Legal, and Public Records – FTC

#### Disciplinary Action Investigatory Files – FTC

#### Clearance to Participate Applications and the Commission's Responses Thereeto, and Related Documents – FTC

#### Management Information System – FTC

#### Office of the Secretary Control and Reporting System – FTC

#### Office of Inspector General Investigative Files – FTC

#### Stenographic Reporting Service Requests – FTC

#### Freedom of Information Act Requests and Appeals – FTC

## PART 4 – MISCELLANEOUS RULES

### Privacy Act Requests and Appeals – FTC Information Retrieval and Indexing System – FTC

(3) Pursuant to 5 U.S.C. 552a(k)(5), investigatory materials compiled to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only where disclosure would reveal the identity of a confidential source of information, in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (i), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(5):

### Personnel Security File – FTC

#### **§4.14 Conduct of business.**

(a) Matters before the Commission for consideration may be resolved either at a meeting under §4.15 or by written circulation. Any Commissioner may direct that a matter presented for consideration be placed on the agenda of a Commission meeting.

(b) *Quorum.* A majority of the members of the Commission, constitutes a quorum for the transaction of business.

(c) Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority. No Commissioner may delegate the authority to determine his or her vote in any matter requiring Commission action, but authority to report a Commissioner's vote on a particular matter resolved either by written circulation, or at a meeting held in the Commissioner's absence, may be vested in a member of the Commissioner's staff.

#### **§4.15 Commission meetings.**



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### (a) *In general.*

(1) Meetings of the Commission, as defined in 5 U.S.C. 552b(a)(2), are held at the principal office of the Commission, unless otherwise directed.

(2) *Initial announcements of meetings.* For each meeting, the Commission shall announce:

- (i) The time, place and subject matter of the meeting,
- (ii) Whether the meeting will be open or closed to the public, and
- (iii) The name and phone number of the official who will respond to requests for information about the meeting.

Such announcement shall be made at least one week before the meeting except that where the agency determines pursuant to 5 U.S.C. 552b(e)(1) to call the meeting on less than one week's notice, or where the agency determines to close the meeting pursuant to paragraph (c)(2) of this section, the announcement shall be made at the earliest practicable time.

(3) *Announcements of changes in meetings.* Following the announcement of a meeting, any change in the time, place or subject matter will be announced at the earliest practicable time, and, except with respect to meetings closed under paragraph (c)(2) of this section, any change in the subject matter or decision to open or close a meeting shall be made only as provided in 5 U.S.C. 552b(e)(2).

(4) *Deletions from announcements.* The requirements of paragraphs (a)(2) and (a)(3) of this section do not require the disclosure of any information pertaining to a portion of a closed meeting where such disclosure is likely to concern a matter within the scope of 5 U.S.C. 552b(c).

(5) *Dissemination of notices.* Notices required under paragraphs (a)(2) and (a)(3) of this section will be posted at the principal office of the Commission, recorded on a telephone message device, and, except as to notices of meetings closed under paragraph (c)(2) of this section, submitted to the *Federal Register* for publication. In addition, notices issued under paragraph (a)(2) of this section one week in advance of the meeting will be sent to all persons and organizations

#### PART 4 – MISCELLANEOUS RULES

who have requested inclusion on a meeting notice mailing list, and will be issued as a press release to interested media.

(b) *Open meetings.*

(1) Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. 552b(c).

(2) Any person whose interest may be directly affected if a portion of a meeting is open, may request that the Commission close that portion for any of the reasons described in 5 U.S.C. 552b(c). The Commission shall vote on such requests if at least one member desires to do so. Such requests shall be in writing, filed at the earliest practicable time, and describe how the matters to be discussed will have any of the effects enumerated in 5 U.S.C. 552b(c). Requests shall be addressed as follows:

Closed Meeting Request  
Office of the General Counsel  
Federal Trade Commission  
6th Street and Pennsylvania Avenue NW.  
Washington, DC 20580.

(3) The Commissioner to whom a matter has been assigned for presentation to the Commission shall have the authority to make available to the public, prior to consideration of that matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.

(c) *Closed meetings.*

(1) Whenever the Commission votes to close a meeting or series of meetings under these rules, it shall make publicly available within one day notices both of such vote and the General Counsel's determination regarding certification under 5 U.S.C. 552b(f)(1). Such determination by the General Counsel shall be made prior to the Commission vote to close a meeting or series of meetings. Further, except with respect to meetings closed under paragraph (c)(2) of this section, the Commission shall make publicly available within one day a full written

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

explanation of its action in closing any meeting, and a list specifying the names and affiliations of all persons expected to attend, except Commission employees and consultants and any stenographer or court reporter attending for the sole purpose of preparing a verbatim transcript. All Commission employees and consultants may attend nonadjudicative portions of any closed meeting and members of Commissioners' personal staffs, the General Counsel and his staff, and the Secretary and his staff may attend the adjudicative portions of any closed meeting except to the extent the notice of a particular closed meeting otherwise specifically provides. Stenographers or court reporters may attend any closed meeting at which their services are required by the Commission.

(2) If a Commission meeting, or portions thereof, may be closed pursuant to 5 U.S.C. 552b(c)(10), the Commission may, by vote recorded at the beginning of the meeting, or portion thereof, close the portion or portions of the meeting so exempt.

(3) Closed meeting transcripts or minutes required by 5 U.S.C. 552b(f)(1) will be released to the public insofar as they contain information that either is not exempt from disclosure under 5 U.S.C. 552b(c), or, although exempt, should be disclosed in the public interest. The Commission will determine whether to release, in whole or in part, the minutes of its executive sessions to consider oral arguments. With regard to all other closed meetings, the General Counsel, without power of redelegation, shall have the authority to determine which portions of the transcripts or minutes may be released. In unusual or difficult cases the General Counsel may, in his sole discretion, refer the question of release to the Commission for determination.

(d) The presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end.

**§4.16 Privilege against self-incrimination.** Section 2.11 of Pub. L. 91-462 specifically repeals paragraph 7 of section 9 of the

#### PART 4 – MISCELLANEOUS RULES

Federal Trade Commission Act. Title 18, section 6002, of the United States Code provides that whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to:

- (a) A court or grand jury of the United States,
- (b) An agency of the United States, or

(c) Either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under section 6004, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Title 18, section 6004, of the United States Code provides that:

(1) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of section 6004, an order requiring the individual to give testimony or provide other information which he refused to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in title 18, section 6002, of the United States Code;

(2) An agency of the United States may issue an order under subsection (a) of section 6004 only if in its judgment (i) the testimony or other information from such individual may be necessary to the public interest; and (ii) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

#### **§4.17 Disqualification of Commissioners.**

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

(a) *Applicability.* This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures.*

(1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.

(c) *Standards.* Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.

## **PART 5 – STANDARDS OF CONDUCT**

### **Subpart A – Employee Conduct Standards and Financial Conflicts of Interest**

#### **§5.1 Cross-reference to executive branch-wide regulations.**

Commissioners and employees, including special government employees, of the Federal Trade Commission (FTC) are subject to and should refer to the “Standards of Ethical Conduct for Employees of the Executive Branch” at 5 CFR part 2635 (“executive branch-wide Standards of Conduct”) and to the FTC regulations at 5 CFR 5701.101 that supplements the executive branch-wide Standards of Conduct.

#### **§5.2 Exemption of insubstantial financial conflicts.**

(a) An employee or special Government employee will not be subject to remedial or disciplinary action or to criminal prosecution under 18 U.S.C. 208(a), if he makes a full disclosure in writing to the official responsible for his appointment of the nature and circumstances of the particular matter involved and of his conflicting financial interest relating thereto, and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from the employee or special Government employee.

(b) For the purposes of paragraph (a) of this section, the “official responsible for appointment” shall be the Executive Director in all cases where the employee is classified at grade G-15 or below, or at a comparable pay level, except that each Commissioner shall be the “official responsible for appointment” of advisors in the Commissioner's immediate office.

(c) In all other cases, the Chairman shall be the “official responsible for appointment.”

(d) The financial interests described below are exempted from the provisions of 18 U.S.C. 208(a) as being too remote or too inconsequential to affect the integrity of an employee's services: Stocks and

ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

bonds of a diversified mutual fund or investment company *Provided*, that the fair market value of the employee's holdings in the fund or company does not exceed one percent of the value of its reported assets.

PART 5 – STANDARDS OF CONDUCT

**Subpart B – Financial Disclosure Requirements**

**§5.10 Cross-reference to executive branch-wide regulations.**

Commissioners and employees, including special government employees, of the Federal Trade Commission are subject to and should refer to the executive branch-wide financial disclosure regulations at 5 CFR part 2634, and to the procedures for filing and review of financial disclosure reports found in Chapter 3 of the FTC *Administrative Manual*.

**Subpart C – [Reserved]**

**Subpart D – [Reserved]**



ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

**Subpart E – Disciplinary Actions Concerning  
Postemployment Conflict of Interest**

**§5.51 Scope and applicability.** These regulations establish procedures for investigating and determining alleged violations of 18 U.S.C. 207 (postemployment restrictions applicable to federal employees) or regulations issued by the Office of Government Ethics, set forth in 5 CFR parts 2637 and 2641, reflecting the views of the Office of Government Ethics and the Department of Justice as to the requirements of 18 U.S.C. 207.

**§5.52 Nonpublic proceedings.** Any investigation or proceedings held under this part shall be nonpublic unless the respondent specifically requests otherwise, except to the extent required by the Freedom of Information Act (5 U.S.C. 552) or by the Sunshine Act (5 U.S.C. 552b). However, the presiding official's initial decision and any final decision of the Commission shall be placed on the public record, except that information may be designated *in camera* in accordance with §3.45 of the Commission's Rules of Practice.

**§5.53 Initiation of investigation.**

(a) Investigations under this part may be initiated upon the submission by any person of a written statement to the Secretary setting forth sufficient information to indicate a possible violation of 18 U.S.C. 207 or by the Commission on its own initiative when a possible violation is indicated by information within the Commission's possession.

(b) At the direction of the Commission, the General Counsel shall investigate any alleged violation of 18 U.S.C. 207.

**§5.54 Referral to the Office of Government Ethics and to the Department of Justice.**

(a) The General Counsel shall make a preliminary determination of whether the matter appears frivolous and, if not, shall expeditiously

## PART 5 – STANDARDS OF CONDUCT

transmit any available information to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice.

(b) Unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution, the General Counsel shall coordinate any investigation or proceeding under this part with the Department of Justice in order to avoid prejudicing criminal proceedings.

### **§5.55 Conduct of investigation.**

(a) The General Counsel may (1) exercise the authority granted in §2.5 of the Commission's Rules of Practice to administer oaths and affirmations; and (2) conduct investigational hearings pursuant to part 2 of these rules. He may also recommend that the Commission issue compulsory process in connection with an investigation under this section.

(b) Witnesses in investigations shall have the rights set forth in §2.9 of the Commission's Rules of Practice.

### **§5.56 Disposition.**

(a) Upon the conclusion of an investigation under this part, the General Counsel shall forward to the Commission a summary of the facts disclosed by the investigation along with a recommendation as to whether the Commission should issue an order to show cause pursuant to §5.57.

(b) When the former government employee involved is an attorney, the General Counsel shall also recommend whether the matter should be referred to the disciplinary committee of the bar(s) of which the attorney is a member.

### **§5.57 Order to show cause.**

(a) Upon a Commission determination that there exists reasonable cause to believe a former government employee has violated

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

18 U.S.C. 207, the Commission may issue an order requiring the former employee to show cause why sanctions should not be imposed.

(b) The show cause order shall contain:

(1) The statutory provisions alleged to have been violated and a clear and concise description of the acts of the former employee that are alleged to constitute the violation;

(2) Notice of the respondent's right to submit an answer and request a hearing, and the time and manner in which the request is to be made; and

(3) A statement of the sanctions that may be imposed pursuant to §5.67 of this part.

(c) Subsequent to the issuance of an order to show cause, any communications to or from the Commission or any member of the Commission shall be governed by the *ex parte* provisions of §4.7 of the Commission's Rules of Practice. 16 CFR 4.7.

### **§5.58 Answer and request for a hearing.**

(a) An answer and request for a hearing must be filed with the Secretary of the Commission within thirty (30) days after service of the order to show cause.

(b) In the absence of good cause shown, failure to file an answer and request for a hearing within the specified time limit:

(1) Will be deemed a waiver of the respondent's right to contest the allegations of the show cause order or request a hearing and

(2) Shall authorize the Commission to find the facts to be as alleged in the show cause order and enter a final decision providing for the imposition of such sanctions specified in §5.67 as the Commission deems appropriate.

(c) An answer shall contain (1) a concise statement of the facts or law constituting each ground of defense and (2) specific admission, denial, or explanation of each fact alleged in the show cause order or, if the respondent is without knowledge thereof, a statement to that effect. Any allegations of a complaint not answered in this manner will be deemed admitted.

## PART 5 – STANDARDS OF CONDUCT

(d) Hearings shall be deemed waived as to any facts in the show cause order that are specifically admitted or deemed to be admitted as a result of respondent's failure to deny them. Those portions of respondent's answer, together with the show cause order, will provide a record basis for initial decision by the Administrative Law Judge or for final decision by the Commission.

(e) If all material factual allegations of the show cause order are specifically admitted or have been deemed admitted in accordance with paragraph (c) of this section, the Commission will decide the matter on the basis of the allegations set forth in the show cause order and respondent's answer.

### **§5.59 Presiding official.**

(a) Upon the receipt of an answer and request for a hearing, the Secretary shall refer the matter to the Chief Administrative Law Judge, who shall appoint an Administrative Law Judge to preside over the hearing and shall notify the respondent and the General Counsel as to the person selected.

(b) The powers and duties of the presiding official shall be as set forth in §3.42(b) through (h) of the Commission's Rules of Practice.

**§5.60 Scheduling of hearing.** The presiding official shall fix the date, time and place of the hearing. The hearing shall not be scheduled earlier than fifteen days after receipt of the respondent's answer and request for a hearing. In fixing the time, date and place of the hearing, the presiding official shall give due regard to the respondent's need for adequate time to prepare a defense and an expeditious resolution of allegations that may be damaging to his or her reputation.

**§5.61 Prehearing procedures; motions; interlocutory appeals; summary decision; discovery; compulsory process.** Because of the nature of the issues involved in proceedings under this part, the Commission anticipates that extensive motions, prehearing proceedings and discovery will not be required in most cases. For this

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

reason, detailed procedures will not be established under this part. However, to the extent deemed warranted by the presiding official, prehearing conferences, motions, interlocutory appeals, summary decisions, discovery and compulsory process shall be permitted and shall be governed, where appropriate, by the provisions set forth in subparts C and D, part 3, of the Commission's Rules of Practice.

**§5.62 Hearing rights of respondent.** In any hearing under this subpart, the respondent shall have the right:

- (a) To be represented by counsel;
  - (b) To present and cross-examine witnesses and submit evidence;
  - (c) To present objections, motions, and arguments, oral or written;
- and
- (d) To obtain a transcript of the proceedings on request.

**§5.63 Evidence; transcript; *in camera* orders; proposed findings of fact and conclusions of law.** Sections 3.43, 3.44, 3.45, and 3.46 of the Commission's Rules of Practice shall govern, respectively, the receipt and objections to admissibility of evidence, the transcript of the hearing, *in camera* orders and the submission and consideration of proposed findings of fact and conclusions of law except that (a) a copy of the hearing transcript shall be provided the respondent; and (b) the Commission has the burden of establishing, by a preponderance of the evidence on the record as a whole, the allegations stated in the order to show cause.

**§5.64 Initial decision.** Section 3.51 of the Commission's Rules of Practice shall govern the initial decision in proceedings under this subpart, except that the determination of the Administrative Law Judge must be supported by a preponderance of the evidence.

**§5.65 Review of initial decision.** Appeals from the initial decision of the Administrative Law Judge or review by the Commission in the absence of an appeal shall be governed by §§3.52 and 3.53 of the

## PART 5 – STANDARDS OF CONDUCT

Commission's Rules of Practice except that oral arguments shall be nonpublic subject to the exceptions stated in §3.52 of this part.

**§5.66 Commission decision and reconsideration.** The Commission's decision and any reconsideration or reopening of the proceeding shall be governed by §§2.51, 3.54, 3.55, 3.71 and 3.72 of the Commission's Rules of Practice, except that (a) if the initial decision is modified or reversed, the Commission shall specify such findings of fact and conclusions of law as are different from those of the presiding official; and (b) references therein to “court of appeals” shall be deemed for purposes of proceedings under this part to refer to “district court.”

**§5.67 Sanctions.** In the case of any respondent who fails to request a hearing after receiving adequate notice of the allegations pursuant to §5.57 or who is found in the Commission's final decision to have violated 18 U.S.C. 207 (a), (b), or (c), the Commission may order such disciplinary action as it deems warranted, including:

- (a) Reprimand;
- (b) Suspension from participating in a particular matter or matters before the Commission; or
- (c) Prohibiting the respondent from making, with the intent to influence, any formal or informal appearance before, or any oral or written communication to, the Commission or its staff on any matter or business on behalf of any other person (except the United States) for a period not to exceed five (5) years.

**§5.68 Judicial review.** A respondent against whom the Commission has issued an order imposing disciplinary action under this part may seek judicial review of the Commission's determination in an appropriate United States District Court by filing a petition for such review within sixty (60) days of receipt of notice of the Commission's final decision.

## INDEX

	Section
<b>access to Commission documents and meetings</b> .....	4.9
<b>Acts</b> ( <i>see also</i> legislation)	
administered by the Commission .....	0.4
<b>adjudicative proceedings</b> .....	3.1-3.83
Administrative Law Judges .....	3.42
admissions .....	3.32
advertising substantiation, admissibility of evidence .....	3.40
affidavits .....	3.24
amendments to pleadings or notices .....	3.15
answers to complaints .....	3.12
appeals .....	3.11A, 3.23, 3.52
Attorney General, approval of orders .....	3.39
commencement of proceedings .....	3.11
complaints .....	3.11
compulsory process .....	3.31-3.40
consent agreement settlements .....	3.25
contempt .....	3.42
date of orders .....	3.56
decisions .....	3.51-3.56
depositions .....	3.33, 3.39
discovery, compulsory process .....	3.31-3.40
evidence .....	3.40, 3.43
experts .....	3.31
Fair Packaging and Labeling Act .....	3.2, 3.13
fast track proceedings .....	3.11A
grants of immunity .....	3.39
hearings .....	3.13, 3.31, 3.41-3.46
<i>in camera</i> orders .....	3.45
initial decisions .....	3.51-3.54
interlocutory appeals .....	3.23
interrogatories .....	3.35
intervention by individuals or organizations .....	3.14
motions .....	3.11, 3.22, 3.26, 3.34, 3.38
nature of .....	3.2

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
orders	3.45, 3.56, 3.72
pleadings	3.11-3.15
prehearing procedures	3.21
presiding officials	3.42
proposed finds, conclusions, and order	3.46
protective orders	3.31
public hearings	3.41
record	3.44
recovery of awards, Equal Access to Justice Act	3.81-3.83
reopening	3.71-3.72
requests for production or access	3.37-3.38A
scope of rules	3.1
stipulations	3.31
subpoenas	3.34, 3.36
summary decisions	3.24
supplemental pleadings	3.15
suspension of attorneys	3.42
witnesses	3.31, 3.39, 3.41
<b>administration, of laws</b>	<b>0.4</b>
Fair Credit Reporting Act	1.71-1.73
Fur Products Labeling Act	1.31-1.34
Textile Fiber Products Identification Act	1.31-1.34
Wool Products Labeling Act	1.31-1.34
<b>Administrative interpretations, industry guides</b>	<b>1.5</b>
<b>Administrative Law Judges</b> ( <i>see also</i> presiding officials)	<b>0.14</b>
appointment provisions	0.14
assignment and duties	3.42
disqualification	3.42
interlocutory appeals	3.23
Office of	0.14, 1.13
order compelling answer	3.38
proposed findings, conclusions and order	3.46
subpoenas	3.31, 3.34, 3.36



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
time extensions .....	4.3
<b>Administrative Procedure Act</b> .....	3.42
<b>admissions</b> , adjudicative proceedings .....	3.32
<b>adverse witnesses</b> .....	3.41
<b>advertising</b>	
Federal Cigarette Labeling and Advertising Act .....	0.4
Labeling and Advertising of Consumer Appliances .....	1.92
substantiation, adjudicative proceedings .....	3.40
<b>advisory opinions</b> .....	1.1-1.4
advice .....	1.3
application .....	1.2
compliance matters .....	1.2, 2.41
industry guidance .....	1.1-1.6
policy .....	1.1
procedure .....	1.2
public disclosure .....	1.4
public record .....	4.9
<b>affidavits</b> , adjudicative proceedings .....	3.24
<b>Agricultural Marketing Act</b> .....	3.81
<b>antitrust</b>	
Bureau of Competition .....	0.16
exemption, Export Trade Act .....	1.41-1.43
<b>Antitrust Improvements Act</b> .....	0.4
<b>appeals</b>	
briefs .....	3.52
cross-appeals .....	3.52
decision on appeal .....	3.54
Freedom of Information Act .....	4.11
from initial decision .....	3.52, 5.65
interlocutory appeals .....	3.23
oral arguments .....	3.52
rulemaking .....	1.13
witnesses .....	2.15

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
<b>appearances before the Commission</b> .....	4.1
<b>appliance labeling rules, penalties for violations</b> .....	1.92-1.97
<b>applications</b>	
advisory opinions .....	1.2
appearances .....	4.1
compulsory process .....	3.31
depositions .....	3.33
Equal Access to Justice Act .....	3.81-3.83
intervention .....	3.14
registered identification numbers .....	1.32
review and appeal .....	3.23
subpoena of records .....	3.34-3.36
trademark cancellation .....	1.51
<b>approval of</b>	
administrative law judges .....	0.14
environmental impact statements .....	1.85
orders requiring testimony or granting immunity ...	2.15, 3.39, 4.16
participation of former member or employee .....	4.1
proposed divestitures or acquisitions .....	2.41
<b>Atlanta Regional Office</b> .....	0.19
<b>Attorney General</b>	
compliance reports .....	2.41
export trade associations .....	1.43
initiation of investigations .....	2.1
noncompliance .....	2.13
orders requiring testimony or granting immunity ...	2.15, 3.39, 4.16
<b>attorneys</b>	
adjudicative hearings, suspension .....	3.42
appearances, qualifications and restrictions .....	4.1
disbarment provisions .....	2.9, 3.24, 4.1
Equal Access to Justice Act .....	3.81-3.83
former Commission members, appearance restrictions .....	4.1
postemployment conflict of interest .....	5.56

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
standards of conduct .....	4.1
<b>Boston Regional Office</b> .....	0.19
<b>briefs</b> , appeal from initial decision .....	3.52
<b>Bureau of Competition</b> ( <i>see also</i> Competition, Bureau of) .....	0.16
<b>Bureau of Consumer Protection</b> ( <i>see also</i> Consumer Protection, Bureau of) .....	0.17
<b>Bureau of Economics</b> ( <i>see also</i> Economics, Bureau of) .....	0.18
<b>business ethics</b> ( <i>see</i> standards of conduct)	
<b>cease and desist orders</b> .....	1.2, 1.62, 3.52
compliance .....	2.33, 2.41
effective date .....	3.56
reopening .....	2.51, 3.71-3.72
<b>CEQ regulations</b> .....	1.81-1.87
<b>Chairman</b> .....	0.8, 5.2
<b>Chicago Regional Office</b> .....	0.19
<b>civil investigative demands</b> .....	1.13, 2.7-2.9, 2.13 4.2
<b>civil penalties</b>	
adjudicative proceedings .....	3.2
appliance labeling rules violations .....	1.92-1.97
Bureaus of Competition and Consumer Protection .....	0.16-0.17
compliance violations .....	2.41
monetary amounts, adjusted .....	1.98
<b>Clayton Act</b>	
adjudicative proceedings .....	3.2
Bureau of Competition .....	0.16
civil penalty monetary amounts, adjusted .....	1.98
enforcement and administrative authority .....	0.4
export trade associations, exemption .....	1.41
nonadjudicative procedures, compliance	
and enforcement provisions .....	2.41
quantity limit rules .....	1.23, 3.2

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
<b>clearance of former employees</b> .....	4.1
<b>Cleveland Regional Office</b> .....	0.19
<b>closed meetings</b> .....	4.15
<b>Commission meetings</b> .....	4.14, 4.15
access to, announcements of .....	4.9-4.10
Chairman .....	0.8
minutes .....	0.12
prehearing procedures .....	3.21
<i>Weekly Calendar and Notice of “Sunshine” Meetings</i> ...	1.13, 1.18
<b>Commissioner of Patents</b> .....	1.51
<b>Commissioners, appointments and terms</b> .....	0.1
<b>Committee on Commerce, Science, and Transportation,</b>	
U.S. Senate .....	1.10-1.11
<b>Committee on Interstate and Foreign Commerce,</b>	
U.S. House of Representatives .....	1.10-1.11
<b>communications</b>	
appearance .....	4.1
compliance reports .....	2.41
Congressional .....	1.18
<i>ex parte</i> .....	1.18, 4.7
rulemaking .....	1.18
<b>compensation</b> ( <i>see</i> fees)	
<b>Competition, Bureau of</b> .....	0.9
antitrust, Clayton Act .....	0.16
environmental impact statement procedures .....	1.83-1.85
nonadjudicative procedures	
compliance reports, authority regarding .....	2.41
investigations, authority to initiate .....	2.1
reports, time extension authority .....	2.12
responsibilities .....	0.16
<b>complaints, adjudicative proceedings</b> .....	3.11
<b>compliance</b>	
advisory opinions .....	1.2, 2.41

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
approval authority .....	2.41
Bureaus of Competition and Consumer Protection ..	0.16-0.17, 2.41
consent order procedure .....	2.33
documents, filing .....	4.2
period, stay of .....	2.7
monitoring .....	2.41
public information .....	2.41, 4.9
Regional Directors .....	2.41
reports .....	2.41, 4.2, 4.9
<b>compulsory process</b>	
adjudicative procedures	
admissions .....	3.32
depositions .....	3.33
general provisions .....	3.31
interrogatories .....	3.35
motion for order .....	3.38
subpoenas .....	3.34, 3.36
applications .....	3.36
withholding requested material .....	3.38A
witnesses .....	3.39
nonadjudicative procedures	
civil investigative demands .....	2.7
custodians .....	2.16
depositions .....	2.10
dispositions .....	2.7
extensions of time .....	2.7
hearings .....	2.8
investigations .....	2.7
noncompliance .....	2.13
orders requiring access .....	2.11
petitions to limit or quash .....	2.7
public disclosure .....	2.7
reports .....	2.12

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
review	2.7
special reports	2.13
stay of compliance period	2.7
subpoenas	2.7
withholding requested material	2.8A
witnesses	2.9
postemployment conflict of interest proceedings	5.55, 5.61
rulemaking	*1.13
<b>computer documents and material</b> , subpoenaed	3.34
<b>computer services</b> , fees	4.8
<b>condemnation proceedings</b> , wool and fur labeling laws	1.64
<b>conduct of Commission business</b>	4.14
<b>conduct, standards of</b>	5.1-5.68
<b>conflicts of interest</b>	
financial	5.1-5.2
postemployment	5.51-5.68
<b>consent orders</b>	
adjudicative proceedings	3.25
nonadjudicative proceedings	
agreement	2.32
compliance procedure	2.33
disposition	2.34
submission	2.31
<b>Consumer Protection, Bureau of</b>	0.9, 0.17
environmental impact statement procedures	1.83-1.85
nonadjudicative procedures	
compliance reports, authority regarding	2.41
investigations, authority to initiate	2.1
reports, time extension authority	2.12
responsibilities	0.17
<b>contempt</b>	

---

\*See specifically §1.13(d)(6).

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
failure to comply with Administrative Law Judge .....	3.42
noncompliance with compulsory process .....	2.13
<b>continuing guaranties</b> , wool, fur, and textile laws .....	1.33
<b>cooperation with other agencies</b> .....	4.6
<b>costs for obtaining Commission records</b> ( <i>see also</i> fees) .....	4.8
<b>Council on Environmental Quality (CEQ)</b>	
National Environmental Policy Act of 1969 .....	1.81
regulations .....	1.81-1.87
<b>Court Decisions – Federal Trade Commission</b> .....	0.10
<b>court of appeals</b>	
ancillary court orders pending review .....	1.62
application for stay .....	3.56
compliance reports .....	2.41
denial of preliminary injunctive relief .....	3.26
order of remand .....	4.7
<b>credit</b>	
Equal Credit Opportunity Act .....	0.4
Fair Credit Billing Act .....	0.4
Fair Credit Reporting Act	
administration .....	1.71
enforcement and administrative authority .....	0.4
interpretations .....	1.73
staff advice .....	1.72
<b>cross-appeals</b> .....	3.11A, 3.52
<b>cross-examination</b>	
appearances .....	4.1
hearings .....	3.41
postemployment conflict of interest .....	5.62
rulemaking .....	1.13
<b>custodians</b>	
document filing and disposition .....	4.2, 4.12
nonadjudicative proceedings .....	2.7-2.8, 2.16

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
<b>Dallas Regional Office</b> .....	0.19
<b>Debt Collection Improvement Act of 1996</b> .....	1.98
<b>decisions</b>	
adjudicative proceedings .....	3.51-3.55
appeal from initial decision .....	3.52
application for stay .....	3.56
decision on appeal or review .....	3.54
effective date of orders .....	3.56
initial decision .....	3.51
reconsideration .....	3.55
review of initial decision .....	3.53
summary .....	3.24
postemployment conflict of interest proceedings ....	5.61, 5.64-5.66
recommended, rulemaking .....	1.13
service provisions .....	4.4
<b>default</b>	
definition, adjudicative proceedings .....	3.12
noncompliance .....	2.13
service .....	4.4
<b>Denver Regional Office</b> .....	0.19
<b>Department of Justice, government ethics</b> .....	5.51
<b>depositions</b>	
adjudicative proceedings .....	3.33
fees for deponents .....	4.5
investigations .....	2.10
<b>disbarment, attorneys</b> .....	2.9, 3.24, 4.1
<b>disciplinary actions</b> ( <i>see also</i> standards of conduct)	
appearance .....	4.1
financial conflict of interest .....	5.1-5.2
postemployment conflict of interest .....	5.51-5.68
<b>disclosure</b>	
advisory opinions .....	1.4
Freedom of Information Act requests .....	4.11



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
nonpublic records, requirements . . . . .	4.10
Privacy Act provisions . . . . .	4.13
requests for access to records . . . . .	4.11
<b>discovery</b>	
adjudicative proceedings . . . . .	3.31-3.40
access for inspection and other purposes . . . . .	3.37
admissions . . . . .	3.32
advertising substantiation, admissibility of evidence . . . . .	3.40
depositions . . . . .	3.33
interrogatories . . . . .	3.35
methods and scope . . . . .	3.31
motion for order compelling disclosure or discovery . . . . .	3.38
orders granting immunity . . . . .	3.39
orders requiring testimony or information . . . . .	3.39
production of documents and things . . . . .	3.37
protective orders . . . . .	3.31
sanctions . . . . .	3.38
stipulations . . . . .	3.31
subpoenas . . . . .	3.34, 3.36
withholding requested material . . . . .	3.38A
witnesses . . . . .	3.39
postemployment conflict of interest proceedings . . . . .	5.61
rulemaking . . . . .	*1.13
<b>disposition of documents submitted</b> . . . . .	4.12
<b>disqualification</b>	
Administrative Law Judges . . . . .	3.42
Commissioners . . . . .	4.17
former members or employees . . . . .	4.1
officers . . . . .	3.33, 3.42
<b>documents</b>	
access and availability . . . . .	4.8-4.9

---

\*See specifically §1.13(d)(6).

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
copying of public records .....	4.8
custodians .....	4.2, 4.12
disposition by Commission .....	4.12
form and filing requirements .....	4.2
schedule of user fees .....	4.8
service provisions .....	4.4
subpoenaed material .....	3.34
time requirements .....	4.3
<b>economic reports and surveys</b> .....	0.18, 1.91
<b>Economics, Bureau of</b>	
authority and duties .....	0.18
default notices .....	2.12
economic surveys, investigations, reports .....	1.91
reports, time extension authority .....	2.12
<b>electronic documents and material, subpoenaed</b> .....	3.34
<b>Energy Policy and Conservation Act</b>	
civil penalty monetary amounts, adjusted .....	1.98
enforcement and administrative authority .....	0.4
penalties for violations .....	1.92-1.97
subpoena power .....	2.7
<b>enforcement</b> ( <i>see also</i> legislation)	
Acts .....	0.4
Bureau of Competition .....	0.16
Bureau of Consumer Protection .....	0.17
Bureau of Economics .....	0.18
<b>environmental impact statements</b>	
Council on Environmental Quality (CEQ) .....	1.81
CEQ regulations .....	1.81-1.87
draft .....	1.84
final .....	1.85
National Environmental Policy Act requirements .....	1.81-1.83
policy .....	1.82

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
publication in <i>Federal Register</i> .....	1.84-1.85
supplemental .....	1.86
<b>Environmental Policy Act</b> , implementation .....	1.81-1.89
<b>Environmental Quality Improvement Act of 1980</b> .....	1.81
<b>Equal Access to Justice Act</b> .....	1.21, 3.81-3.83
<b>Equal Credit Opportunity Act</b> .....	0.4
<b>ethics</b> ( <i>see</i> standards of conduct)	
<b>evidence</b>	
adjudicative proceedings .....	3.40, 3.43
admissibility .....	3.40, 3.43
burden of proof .....	3.43
postemployment conflict of interest proceeding .....	5.63
<b>ex parte communications</b> .....	1.13, 3.31, 4.7
<b>examination</b>	
appearances .....	4.1
hearings .....	3.41
postemployment conflict of interest .....	5.62
rulemaking .....	1.13
<b>Executive Director</b>	
authority and responsibilities .....	0.10
award fees and expenses .....	3.81
fee schedules .....	4.8
Freedom of Information Act; requests, authority .....	4.11
Privacy Act requests .....	4.13
public information, public records .....	4.8, 4.9
publication of actions .....	0.10
regional offices .....	0.19
<b>expert witnesses</b> .....	3.31
<b>Export Trade Act</b>	
adjudicative proceedings .....	3.2
antitrust exemption .....	1.41-1.43
civil penalty monetary amounts, adjusted .....	1.98
enforcement and administrative authority .....	0.4

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
investigations .....	1.43, 2.8
<b>export trade associations</b>	
Clayton Act exemption .....	1.41
investigation and recommendations by Commission .....	1.43
notice provisions .....	1.42
Sherman Act exemption .....	1.41
<b>Fair Credit Billing Act</b> .....	0.4
<b>Fair Credit Reporting Act</b> .....	0.4
administration .....	1.71-1.73
counseling and advice .....	1.72
enforcement and administrative authority .....	0.4
interpretations .....	1.73
<b>Fair Packaging and Labeling Act</b> .....	0.4
adjudicative proceedings .....	3.2, 3.13, 3.54
enforcement and administrative authority .....	0.4
rulemaking .....	1.24
<b>fast track adjudicative proceedings</b> .....	3.11A
<b>Federal Cigarette Labeling and Advertising Act</b> .....	0.4
<b>Federal Records Act</b> .....	4.12
<b><i>Federal Register</i></b>	
advance notice of proposed rulemaking .....	1.10
alternative procedures .....	1.20
Commission meetings .....	4.15
consent agreements .....	3.25
environmental impact statements .....	1.83-1.84
Fair Credit Reporting Act interpretations .....	1.73
Fair Packaging and Labeling Act .....	3.54
final notice of proposed rulemaking .....	1.12
final rule publication .....	1.14
general notice .....	1.26
initial notice of proposed rulemaking .....	1.11
nonadjudicative procedures, disposition notice .....	2.34

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
nonsubstantive amendments to rules .....	1.15
Privacy Act .....	4.13
publications of actions, generally .....	0.10
<b>Federal-State and Consumer Relations, Director</b> .....	2.1
<b>Federal Tort Claims Act</b> .....	0.5
<b>Federal Trade Commission</b>	
address .....	0.2
adjudicative proceedings, reopening .....	3.71-3.72
Administrative Law Judges .....	0.14
appointments and terms of Commissioners .....	0.1
Bureau of Competition .....	0.16
Bureau of Consumer Protection .....	0.17
Bureau of Economics .....	0.18
Chairman .....	0.8
conduct of business .....	4.14
Executive Director .....	0.10
former members and employees, appearance restrictions .....	4.1
functions delegated .....	0.7
General Counsel .....	0.11
hours .....	0.3
laws administered .....	0.4
laws authorizing monetary claims .....	0.5
legislative review, trade regulations .....	1.14
meetings .....	4.15
organization .....	0.1-0.19
promulgation of rules .....	1.7, 1.14, 1.26
quorum .....	4.14
regional offices .....	0.19
review of rulemaking record .....	1.13
Secretary .....	0.12
structure .....	0.9
<b>Federal Trade Commission Act (FTC Act) of 1914</b> .....	0.1, 0.4
civil investigative demands .....	2.7, 2.9

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
civil penalty monetary amounts, adjusted .....	1.98
compliance enforcement, nonadjudicative procedures .....	2.41
export trade associations .....	1.41
injunctions .....	1.61
rulemaking .....	0.16-0.17, 1.7
witnesses .....	2.9, 4.16
<b>Federal Trade Commission Improvement Act</b> .....	0.4
<b>fees</b>	
deponents and witnesses .....	4.5
duplication of records .....	4.8
Freedom of Information Act .....	4.11
obtaining Commission records .....	4.8
presiding officials .....	4.5
Privacy Act provisions .....	4.13
responsibility for .....	4.5
search and review .....	4.8
schedule .....	4.8
<b>filing requirements</b>	
form, number of copies .....	4.2
time, computation and extensions .....	4.3
<b>financial conflicts of interest</b> .....	5.1-5.2
<b>financial disclosure</b> .....	5.10
<b>Flammable Fabrics Act, compliance</b> .....	2.41
<b>Freedom of Information Act</b>	
nonpublic information .....	4.10, 4.13, 5.52
public information .....	4.9
requests, appeals procedure .....	4.11
<b>Fur Products Labeling Act</b>	
administration .....	1.31-1.34
civil penalty monetary amounts, adjusted .....	1.98
condemnation .....	1.64
continuing guaranties .....	1.33
enforcement and administrative authority .....	0.4

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
injunctions . . . . .	1.63
inspection and counseling . . . . .	1.34
registered identification numbers . . . . .	1.32
rulemaking . . . . .	1.21-1.26
 <b>General Counsel, Office of</b>	
appearance by former members and employees, authority . . . . .	4.1
authority and duties . . . . .	0.11
disciplinary actions, conflict of interest . . . . .	5.53-5.56
environmental impact statements, implementation . . . . .	1.85
Freedom of Information Act requests, appeals procedure . . . . .	4.11
investigational process, noncompliance . . . . .	2.13
Privacy Act requests, appeals procedure . . . . .	4.13
 <b>Government Ethics, Office of</b>	
appearance restrictions, former Commission members and employees . . . . .	4.1
postemployment conflict of interest . . . . .	5.51, 5.54
<b>guaranties, continuing</b> , wool, fur, and textile laws . . . . .	1.33
 <b>Hart-Scott-Rodino Antitrust Improvements Act of 1976 . . . . .</b>	
<b>hearings</b>	
adjudicative proceedings . . . . .	3.41-3.46
evidence . . . . .	3.43
<i>in camera</i> orders . . . . .	3.45
open to public . . . . .	3.41
prehearing conferences . . . . .	3.21
preparation, discovery . . . . .	3.31
presiding official . . . . .	3.42
proposed findings, conclusions and orders . . . . .	3.46
record . . . . .	3.44
Fair Packaging and Labeling Act rulemaking issues . . . . .	1.26, 3.13
informal rulemaking . . . . .	1.13
nonadjudicative investigations . . . . .	2.8-2.10

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
oral rulemaking	1.26
postemployment conflict of interest	5.58-5.63
written transcript, rulemaking	1.13
<b>Hobby Protection Act</b>	0.4
<b>House Committee on Interstate and Foreign Commerce,</b>	
notice of proposed rulemaking	1.10-1.11
<b>identification numbers, registered, wool, fur, and textile laws</b>	1.32
<b>immunity, grants of</b>	2.15, 3.39
<b>in camera orders, hearings</b>	3.45
<b>industry guidance</b>	
advisory opinions	1.1-1.4
industry guides	1.5-1.6
<b>initial decisions</b>	
adjudicative proceedings	3.51
postemployment conflict of interest	5.64-5.66
<b>injunctions</b>	1.61-1.63
<b>inspections and counseling, wool, fur, and textile laws</b>	1.34
<b>interagency/intra-agency communications</b>	4.10
<b>interlocutory appeals</b> ( <i>also see</i> appeals)	
adjudicative proceedings	3.23
postemployment conflict of interest proceedings	5.62
<b>Internal Revenue Code</b>	3.81
<b>interrogatories, adjudicative proceedings</b>	3.35
<b>intervention in adjudicative proceedings</b>	3.14
<b>investigations</b>	
Attorney General	2.13, 2.15, 2.41
Bureau of Competition	0.16, 2.1, 2.12, 2.41
Bureau of Consumer Protection	0.17, 2.1, 2.12, 2.41
Bureau of Economics	0.18, 1.91
civil investigative demands	2.7
compliance reports	2.41
compulsory process	2.7



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
consent orders .....	2.31-2.34
custodians .....	2.16
depositions .....	2.10
disposition .....	2.14
examiners .....	2.5
Export Trade Act .....	1.43, 2.8
Federal-State and Consumer Relations .....	2.1
grants of immunity .....	2.15
hearings .....	2.8
initiation .....	2.1-2.2
investigators .....	2.5
National Environmental Policy Act provisions .....	1.82
nonadjudicative procedures .....	2.1-2.16
noncompliance .....	2.13
notification of purpose .....	2.6
orders granting immunity .....	2.15
orders requiring access .....	2.11
orders requiring testimony or information .....	2.15
petitions to limit or quash .....	2.7, 2.11
policy .....	2.3-2.4
postemployment conflict of interest .....	5.53-5.56
reports .....	2.12
requests to reopen .....	2.51
stay of compliance period .....	2.7
withholding requested material .....	2.8A
witnesses .....	2.9, 2.15
 <b>judicial review</b>	
postemployment conflict of interest proceedings .....	5.68
rulemaking provisions .....	1.19
<b>Justice, Department of</b> .....	5.51, 5.54
 <b>Labeling and Advertising of Consumer Appliances</b> .....	1.92

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
<b>labor organizations</b> .....	3.14
<b>law enforcement agencies, nonpublic information requests</b> ....	4.11
<b>laws administered by the Commission</b> .....	0.4
<b>legislation</b>	
Administrative Procedure Act .....	3.42
Agricultural Marketing Act .....	3.81
Clayton Act .....	0.4, 1.23, 1.41, 1.98, 2.41, 3.2
Debt Collection Improvement Act of 1996 .....	1.98
Energy Policy and Conservation Act .....	0.4, 1.92-1.98, 2.7
Environmental Quality Improvement Act of 1980 .....	1.81
Equal Access to Justice Act .....	3.81-3.83
Equal Credit Opportunity Act .....	0.4
Export Trade Act .....	0.4, 1.41-1.43, 1.98, 2.8, 3.2
Fair Credit Billing Act .....	0.4
Fair Credit Reporting Act .....	0.4, 1.71-1.73
Fair Packaging and Labeling Act .....	0.4, 1.21-1.26, 3.2, 3.13, 3.41, 3.54
Federal Cigarette Labeling and Advertising Act .....	0.4
Federal Records Act .....	4.12
Federal Trade Commission Act (FTC Act) of 1914 .....	0.1, 0.4, 0.16-0.17, 1.7-1.20, 1.61, 1.98, 2.5, 2.7, 2.9, 2.13, 2.16, 2.41, 4.2, 4.4, 4.10
Flammable Fabrics Act .....	2.41
Freedom of Information Act .....	3.36, 4.11, 5.52
Fur Products Labeling Act .....	0.4, 1.24, 1.31-1.34, 1.63-1.64, 1.98, 3.2
Hart-Scott-Rodino Antitrust Improvement Act of 1976 .....	0.4
Hobby Protection Act .....	0.4
Magnuson-Moss Warranty–Federal Trade Commission Improvement Act .....	0.4
Military Personnel and Civilian Employees Claims Act of 1964 .	0.5
National Environmental Policy Act of 1969 .....	1.81
Packers and Stockyards Act .....	0.4

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
Privacy Act . . . . .	4.13
Regulatory Flexibility Act . . . . .	1.11, 1.14
Robinson-Patman Act . . . . .	1.23
Sherman Act . . . . .	1.41
Sunshine Act . . . . .	4.15, 5.52
Textile Fiber Products Identification Act . . . . .	0.4, 1.24, 1.31-1.34, 1.63, 3.2
Trade-Mark Act . . . . .	0.4, 1.51
Truth in Lending Act . . . . .	0.4
Webb-Pomerene Act (Export Trade Act) . . . . .	0.4, 1.41-1.43, 1.98, 2.8, 3.2
Wool Products Labeling Act . . . . .	0.4, 1.24, 1.31-1.34, 1.63-1.64, 1.98, 3.2
<b>liaison officer, Commission</b> . . . . .	2.15, 3.39, 4.11
<b>liaison with Congress</b> . . . . .	0.11
<b>Los Angeles Regional Office</b> . . . . .	0.19
 <b>Magnuson-Moss Warranty–Federal Trade Commission</b>	
<b>Improvement Act</b> . . . . .	0.4
<b>medical records</b> . . . . .	4.10, 4.13
<b>meetings, Commission</b> . . . . .	4.14, 4.15
access to, announcements of . . . . .	4.9-4.10
Chairman . . . . .	0.8
minutes . . . . .	0.12
prehearing procedures . . . . .	3.21
<i>Weekly Calendar and Notice of “Sunshine” Meetings</i> . . .	1.13, 1.18
<b>microfilm services, fee schedule</b> . . . . .	4.8
<b>Military Personnel and Civilian Employees Claims Act of 1964</b> .	0.5
<b>miscellaneous rules</b> . . . . .	4.1-4.17
<b>monetary civil penalty amounts, adjusted</b> . . . . .	1.98
<b>monetary claims against the Commission</b> . . . . .	0.5
<b>motions</b>	
adjudicative proceedings . . . . .	3.11, 3.22, 3.26, 3.34, 3.38, 3.42

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
nonadjudicative proceedings, extension of time . . . . .	2.11
postemployment conflict of interest proceedings . . . . .	5.61
rulemaking . . . . .	1.13
 <b>National Environmental Policy Act of 1969 (NEPA)</b>	
authority . . . . .	1.81
Council on Environmental Quality (CEQ) guidelines . . . .	1.81-1.82
CEQ regulations . . . . .	1.81-1.87
decisionmaking . . . . .	1.87
environmental impact statements . . . . .	1.83-1.86
implementing procedures . . . . .	1.88
policy of Commission . . . . .	1.82
<b>New York Regional Office</b> . . . . .	0.19
<b>nonadjudicative procedures</b> . . . . .	2.1-2.51
Attorney General . . . . .	2.13, 2.15, 2.41
Bureaus of Competition and Consumer Protection . .	2.1, 2.12, 2.41
civil investigative demands . . . . .	2.7
compliance reports . . . . .	2.41
compulsory process . . . . .	2.7
consent orders . . . . .	2.31-2.34
custodians . . . . .	2.16
depositions . . . . .	2.10
disposition . . . . .	2.14
examiners . . . . .	2.5
Federal-State and Consumer Relations . . . . .	2.1
grants of immunity . . . . .	2.15
hearings . . . . .	2.8
initiation . . . . .	2.1-2.2
inquiries, investigations, and compulsory process . . . . .	2.1-2.16
investigators . . . . .	2.5
noncompliance . . . . .	2.13
notification of purpose . . . . .	2.6
orders granting immunity . . . . .	2.15

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
orders requiring access	2.11
orders requiring testimony or information	2.15
petitions to limit or quash	2.7, 2.11
policy	2.3-2.4
reports	2.12
requests to reopen	2.51
stay of compliance period	2.7
subpoenas	2.7
withholding requested material	2.8A
witnesses	2.9, 2.15
<b>noncompliance</b>	2.13
<b>nonpublic information</b> ( <i>see also</i> public information)	4.10
Freedom of Information Act	4.10-4.11, 4.13, 5.52
Privacy Act	4.13
requests and subpoenas	4.11
<b>nonpublic proceedings</b> , postemployment conflict of interest	5.52
<b>notice provisions</b>	
appearance	4.1
appliance labeling rules	1.93
export trade associations, antitrust exemption	1.42
investigation procedures	2.6
proposed penalty, appliance labeling rule violation	1.93
proposed rulemaking	1.10-1.12, 1.26
<b>numbers, registered identification</b> , wool, fur, and textile laws	1.32
<b>Office of Administrative Law Judges</b>	0.14
<b>Office of Congressional Relations</b>	0.8
<b>Office of the Executive Director</b>	0.10
<b>Office of the General Counsel</b>	0.11
<b>Office of Government Ethics</b>	5.51
<b>Office of Personnel Management (OPM)</b>	0.14, 4.13, 5.2, 5.51
<b>Office of Public Affairs</b>	0.8
<b>Office of the Secretary</b>	0.12

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
<b>offices, regional</b> .....	0.19
<b>open meetings</b> .....	4.15
<b>orders</b>	
adjudicative proceedings	
final orders .....	3.54-3.55
<i>in camera</i> orders .....	3.45
order compelling answer .....	3.38-3.38A
order compelling testimony .....	3.39
prehearing conferences .....	3.21
proposed findings, conclusions and order .....	3.46
protective orders .....	3.31
show cause orders .....	3.72
cease and desist orders .....	1.2, 1.62, 3.52
compliance .....	2.33, 2.41
effective date .....	3.56
reopening .....	2.51, 3.71-3.72
review of .....	1.62
filing of reports .....	2.12
noncompliance .....	2.13
requiring access .....	2.11
service provisions .....	4.4
show cause .....	5.57
special (6(b)) .....	2.11-2.13
<b>organization</b> ( <i>see</i> Federal Trade Commission)	
<b>Packers and Stockyards Act</b> .....	0.4
<b>Patents, Commissioner of</b> .....	1.51
<b>penalties</b>	
appliance labeling rules violations .....	1.92-1.97
civil penalty monetary amounts, adjusted .....	1.98
Energy Policy and Conservation Act violations .....	1.92-1.97
Privacy Act provisions .....	4.13
<b>personnel files</b> .....	4.10

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
<b>Personnel Management, Office of (OPM)</b> . . . . .	0.14, 4.13, 5.2, 5.51
<b>petitions</b>	
industry guides . . . . .	1.6
rulemaking . . . . .	1.9, 1.16, 1.25
to limit or quash . . . . .	2.7, 2.11, 2.12
<b>pleadings, adjudicative proceedings</b>	
amendments . . . . .	3.15
answer . . . . .	3.12
commencement . . . . .	3.11
Fair Packaging and Labeling Act . . . . .	3.13
fast track proceedings . . . . .	3.11A
intervention . . . . .	3.14
supplemental . . . . .	3.15
<b>policy</b>	
advisory opinions . . . . .	1.1
cooperation with government agencies . . . . .	4.6
investigations . . . . .	2.4
private controversies . . . . .	2.3
<b>postemployment conflict of interest</b> . . . . .	5.51-5.68
<b>prehearing procedures, adjudicative proceedings</b> . . . . .	3.21
<b>presiding officials</b> ( <i>see also</i> Administrative Law Judges)	
adjudicative proceedings . . . . .	3.42
fees . . . . .	4.5
postemployment conflict of interest . . . . .	5.59
rulemaking . . . . .	1.13
<b>Privacy Act rules</b> . . . . .	4.13
<b>privilege against self-incrimination</b> . . . . .	4.16
<b>process, compulsory</b> ( <i>see</i> compulsory process)	
<b>process, service of</b> . . . . .	4.4
<b>promulgation of industry guides</b> . . . . .	1.6
<b>promulgation of rules</b> ( <i>see also</i> rulemaking) . . . . .	1.14, 1.26
<b>protective orders</b> . . . . .	3.31
<b>Public Affairs, Office of</b> . . . . .	0.8, 4.9

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
<b>public disclosure, appearances</b> .....	4.1
<b>public information</b> ( <i>see also</i> nonpublic information) .....	4.9
adjudicative proceedings .....	3.21
advisory opinions .....	1.4
availability of records .....	4.8-4.9
categories .....	4.9
Commission meetings .....	4.15
compliance reports .....	2.33, 2.41
consent agreements .....	2.32, 2.34
copying of public records .....	4.8-4.9
<i>Federal Register</i> publication of actions, generally .....	0.10
hearings .....	3.41
petitions .....	2.7, 2.11
<b>publications</b> ( <i>see also Federal Register</i> )	
<i>Court Decisions – Federal Trade Commission</i> .....	0.10
<i>Federal Trade Commission Decisions</i> .....	0.10
<b>qualifications for practice before the Commission</b> .....	4.1
<b>quantity limit rules</b> .....	1.23, 3.2
<b>quorum</b> .....	4.14
<b>records</b>	
adjudicative proceedings, hearings .....	3.44
Federal Records Act .....	4.12
Freedom of Information Act requests .....	4.11
<i>in camera</i> .....	3.45
investigative .....	2.8
nonpublic provisions .....	4.10
Privacy Act provisions .....	4.13
public .....	4.9
advisory opinions .....	1.4
availability for copying and inspection .....	4.9
compliance reports .....	2.33, 2.41



## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
consent agreements .....	2.32, 2.34
copying provisions and fee schedule .....	4.8
petitions .....	2.7, 2.11
reporting and transcription .....	3.44
rulemaking .....	1.18
subpoenas for government documents .....	3.36-3.37
<b>recovery of awards, Equal Access to Justice Act</b> .....	3.81-3.83
<b>Regional Directors</b> .....	0.19
nonadjudicative procedures	
closing investigations, authority .....	2.14
compliance reports, authority regarding .....	2.41
custodian, replacement of .....	2.16
grants of immunity .....	2.15
investigations, authority to initiate .....	2.1
reports, time extension authority .....	2.12
subpoenas and civil investigative demands .....	2.7
time extensions .....	2.11-2.12
<b>regional offices</b> .....	0.19
services of documents, time limitations .....	4.4
<b>registered identification numbers, wool, fur, and textile laws</b> ....	1.32
<b>regulatory analysis, rulemaking</b> .....	1.11, 1.14
<b>Regulatory Flexibility Act</b> .....	1.11, 1.14
<b>reopening</b>	
adjudicative proceedings .....	3.71-3.72
nonadjudicative proceedings .....	2.51, 4.12
<b>reports</b> .....	4.12
annual, to Congress .....	4.9
Bureau of Economics .....	1.91
compliance .....	2.33-2.34, 2.41, 4.9
financial disclosure .....	2.12
nonadjudicative investigations .....	1.13
rulemaking, staff .....	2.51
<b>requests</b>	

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
for advice . . . . .	1.1-1.2, 2.41
for production of or access to materials . . . . .	3.38
to reopen nonadjudicative procedures . . . . .	4.12
<b>return of documents</b> . . . . .	4.12
<b>Robinson-Patman Act</b> , quantity limit rules . . . . .	1.23
<b>rulemaking</b>	
alternative procedures . . . . .	1.20
amendment, modification, or repeal . . . . .	1.15, 1.19
authority and use of trade regulation rules . . . . .	1.8
Bureaus of Competition and Consumer Protection . . . . .	0.16-0.17
commencement of proceeding . . . . .	1.9-1.11, 1.25
communications . . . . .	1.13, 1.18, 1.26
compulsory process . . . . .	*1.13
decision . . . . .	1.13, 1.26
effective date of rules . . . . .	1.14, 1.26
exemption, petition for . . . . .	1.16
Fair Packaging and Labeling Act . . . . .	1.24, 1.26
Federal Trade Commission Act (FTC Act) . . . . .	1.7-1.8, 1.19
Fur Products Labeling Act . . . . .	1.24
hearings . . . . .	1.13, 1.26
initiation . . . . .	1.9, 1.25
investigations . . . . .	1.8, 1.26
judicial review . . . . .	1.19
notice requirements . . . . .	1.10-1.12, 1.26
petition for exemption . . . . .	1.16
petition to commence proceedings . . . . .	1.9, 1.25
postrecord comment . . . . .	1.13
preliminary regulatory analysis . . . . .	1.11
presiding officer, appointment and duties . . . . .	0.5, 1.13
procedures . . . . .	1.13, 1.26
promulgation . . . . .	1.14, 1.26

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\*See specifically §1.13(d)(6).

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
statement of basis and purpose .....	1.14
quantity limit rules .....	1.23
records .....	1.18
regulatory analysis .....	1.11, 1.14
review of record .....	1.13
rulemaking record .....	1.18
small business .....	1.14
staff recommendations .....	1.13
statement of basis and purpose .....	1.14, 1.18-1.19
Textile Fiber Products Identification Act .....	1.24
trade regulation rules .....	1.7-1.20
under authority other than Section 18(a)(1)(b)	
of the FTC Act .....	1.21-1.26
under Section 18(a)(1)(b) of the FTC Act .....	1.7-1.20
unlawful trade practices .....	1.21-1.26
Wool Products Labeling Act .....	1.24
<b>San Francisco Regional Office</b> .....	0.19
<b>sanctions</b>	
discovery .....	3.38
postemployment conflict of interest .....	5.67
<b>schedule of adjudicative proceedings</b> .....	3.11A, 3.21
<b>Seattle Regional Office</b> .....	0.19
<b>Secretary, Office of the</b> .....	0.12
advice, request for .....	2.41
appearances .....	4.1
authority and duties .....	0.12
document filing requirements .....	4.2
document requests .....	4.12
environmental impact statements, comments on .....	1.84-1.85
<i>ex parte</i> communications .....	4.7
Fair Credit Reporting Act .....	0.1, 0.4
copy availability .....	1.71

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
interpretations, request for	1.73
motions, filing of	3.22, 3.42
order, correcting transcript	3.52
petition to limit or quash	2.7, 2.11-2.12
postemployment conflict of interest	5.53, 5.58
proceedings, requests to reopen	2.51
registered identification numbers	1.32
rule initiation	1.9
service provisions	4.4
<b>self-incrimination</b>	3.39, 4.16
<b>Senate Committee on Commerce, Science and Transportation,</b>	
notice of proposed rulemaking	1.10-1.11
<b>service</b>	4.4
<b>Sherman Act</b> , exemption for export trade associations	1.41
<b>show cause orders</b>	5.57
reopening proceedings	3.72
requesting hearing	5.58
<b>small business</b> , rulemaking	1.14
<b>special orders (6(b))</b>	2.11-2.13
<b>standards of conduct</b>	5.1-5.68
attorneys practicing before Commission	4.1
disbarment provisions	4.1
executive branch	5.1, 5.10
financial conflicts of interest	5.1-5.2
financial disclosure	5.10
postemployment conflict of interest	5.51-5.68
<b>statement of basis and purpose</b> , rulemaking	1.14, 1.18-1.19
<b>statutes</b> ( <i>see also</i> legislation)	0.4
<b>stenographic reporting</b>	3.21, 3.44, 3.52
<b>stipulations</b>	
in discovery	3.31
to correct deposition or record	3.33, 3.44
<b>subpoenas</b>	

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
adjudication proceedings .....	3.34
Administrative Law Judge .....	3.42
depositions .....	3.33
disclosure requests .....	4.11
discovery .....	3.34
Energy Policy and Conservation Act .....	2.7
government documents .....	3.36-3.37
material .....	3.34-3.36
motions to limit or quash .....	3.22, 3.34
nonadjudicative investigations .....	2.7
noncompliance .....	2.13
nonpublic information .....	4.11
petitions to limit or quash .....	2.7
prehearing conferences .....	3.21
Regional Directors .....	2.7
service provisions .....	4.4
subpoenas <i>ad testificandum</i> .....	3.34
subpoenas <i>duces tecum</i> .....	3.34
withholding material .....	2.8A, 3.38A
<b>substitution of Administrative Law Judge</b> .....	3.42
<b>summary decisions</b> .....	3.24, 3.51
postemployment conflict of interest .....	5.61
<b>Sunshine Act</b> .....	4.1, 4.15, 5.52
<b>supplemental pleadings</b> .....	3.15
<b>suspension of attorneys</b> .....	3.42
 <b>termination of existing orders</b> .....	 3.72
<b>terms of Commissioners</b> .....	0.1
<b>testimony</b>	
civil investigative demands for oral testimony .....	2.7
depositions .....	2.10, 3.33
investigative hearings .....	2.8-2.9
nonpublic .....	4.10

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
orders compelling testimony .....	3.39
public .....	4.9
self-incrimination .....	4.16
subpoenas compelling testimony .....	3.31, 3.34
<b>Textile Fiber Products Identification Act</b>	
adjudicative proceedings .....	3.2
administration .....	1.31-1.34
continuing guaranties .....	1.33
enforcement and administrative authority .....	0.4
injunctions .....	1.63
inspections and counseling .....	1.34
registered identification numbers .....	1.32
rulemaking .....	1.21-1.26
<b>time</b>	
adjudicative proceedings .....	3.11-3.14, 3.21-3.25, 3.32, 3.37, 3.42, 3.51-3.52, 3.54-3.55, 3.72, 3.81-3.83
appeals .....	2.15
appearances .....	4.1
Commission meetings .....	4.15
compliance reports .....	2.41
computations .....	4.3
conflicts of interest .....	5.58
consent agreements .....	2.32, 2.34
environmental impact statements .....	1.84-1.85
extensions .....	2.7, 4.3
export trade associations .....	1.42
fast track adjudicative proceedings .....	3.11A
filing requirements .....	4.3
Freedom of Information Act reports, limitations .....	4.11
judicial review .....	5.68
nonpublic information .....	4.10
penalties, appliance labeling .....	1.93, 1.95
petitions to quash .....	2.7, 2.11-2.12

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	<b>Section</b>
Privacy Act . . . . .	4.13
public information . . . . .	4.8
rulemaking proceedings . . . . .	1.11, 1.13-1.14, 1.26
stay of compliance period . . . . .	2.7
triggering events, fast track proceedings . . . . .	3.11A
<b>trade practices</b>	
Bureaus of Competition and Consumer Protection . . . . .	0.16-0.17
industry guides . . . . .	1.5-1.6
trade regulation rules . . . . .	1.7-1.20
<b>trade regulation</b> ( <i>see also</i> rulemaking)	
exemption petitions . . . . .	1.16
Federal Trade Commission Act (FTC Act) . . . . .	1.7-1.8
<b>trade secrets, nonpublic information</b> . . . . .	4.10
<b>Trade-Mark Act</b>	
enforcement and administrative authority . . . . .	0.4
trademark cancellation procedure . . . . .	1.51
<b>Truth in Lending Act</b> . . . . .	0.4
 <b>U.S. Congress</b> . . . . .	 4.11
annual report to . . . . .	4.9
communications about rulemaking . . . . .	1.18
House Committee on Interstate and Foreign Commerce,	
notice of proposed rulemaking . . . . .	1.10-1.11
liaison activities . . . . .	0.11
nonpublic information, committee requests . . . . .	4.11
privilege against self-incrimination . . . . .	4.16
review of final rules . . . . .	1.14
Senate Committee on Commerce, Science and Transportation,	
notice of proposed rulemaking . . . . .	1.10-1.11
<b>U.S. Department of Justice</b> . . . . .	5.51, 5.54
<b>unlawful trade practices, rulemaking</b> . . . . .	1.21-1.26

### violations

## ORGANIZATION, PROCEDURES, AND RULES OF PRACTICE

### INDEX

	Section
appliance labeling rules . . . . .	1.92-1.97
civil penalty monetary amounts, adjusted . . . . .	1.98
compliance . . . . .	2.41
Energy Policy and Conservation Act . . . . .	1.92-1.97
postemployment restrictions for Federal employees . . . . .	5.51
<b>Webb-Pomerene Act</b> ( <i>see</i> Export Trade Act)	
<b><i>Weekly Calendar and Notice of “Sunshine” Meetings</i></b>	
notice of oral communications . . . . .	1.18
rulemaking, oral presentations . . . . .	1.13
<b>withholding material</b> . . . . .	2.8A, 3.38A
<b>witnesses</b>	
compelling testimony, grants of immunity . . . . .	2.15, 3.39
expert . . . . .	3.31
fees . . . . .	4.5
index of . . . . .	3.46
privilege against self-incrimination . . . . .	4.16
rights in investigations . . . . .	2.9
<b>Wool Products Labeling Act</b>	
adjudicative proceedings . . . . .	3.2
administration . . . . .	1.31-1.34
civil penalty monetary amounts, adjusted . . . . .	1.98
condemnation . . . . .	1.64
continuing guaranties . . . . .	1.33
enforcement and administrative authority . . . . .	0.4
injunctions . . . . .	1.63
inspections and counseling . . . . .	1.34
registered identification numbers . . . . .	1.32
rulemaking . . . . .	1.24